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A

TREATISE

OF THE

LAW

RELATIVE TO

CONTRACTS AND AGREEMENTS

Not Under Seal.

WITH CASES AND DECISIONS THEREON
IN THE ACTION OF ASSUMPSIT.

IN FOUR PARTS.

By SAMUEL COMYN, Esq.
OF THE MIDDLE TEMPLE,
BARRISTER AT LAW.

VOL. I.

LONDON:
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ADVERTISEMENT.

THE numerous queſtions which have ariſen in the Courts of Common Law upon Contracts and Agreements, make it deſirable to have a ready acceſs to the determinations reſpecting them.

With this view the Author was firſt led to undertake the following Work, which he now ſubmits to the Public in the hope that, from its arrangement, it will be found an uſeful book of reference, and obviate the neceſſity of a long and laborious reſearch into the vaſt variety of detached Reports of Caſes upon the ſubject.

S. C.

Serjeant's Inn, Fleet Street,
October 25th, 1807.

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ERRATA

ERRATA:

IN VOLUME FIRST.

Page 45, line 27, for "*is*" read "*are*."
53, l. 21, for "*a man*" read "*the man.*"
59, l. 25, after the word "*any*" read "*new.*"
67, l. 31, for "*Statutes*" read "*Statute.*"
90, l. 2 from the bottom, dele "*or.*"
115, l. 14, for "*ſhowed*" read "*ſhown.*"
164, l. 10 from the bottom, after "*minority*" read "*when he is able.*
186, l. 16, after the word "*the*" read "*caſe.*"
226, bottom line, for "18" read "1."
243, bottom line, after "*Ib.*" read "360."
276, l. 29, after "*ground,*" read "*of.*"
287, l. 23, inſtead of "*hath,*" read "*doth.*"
288, l. 12, inſtead of "*as*" read "*or.*"
290, l. 17, inſtead of "*intitle*" read "*entitle.*"
336, line 8 from the bottom, for "*reaſonable*" read "*reaſonably.*"
343, laſt line, for "*and*" read "*&c.*"
351, laſt line but one, after the word "*was*" read "*burnt.*"
361, l. 10. dele "*But.*"
375, l. 6. after "*be*" add "*ſo.*"
379, l. 15, after "*but*" read "*muſt*;" and dele "*muſt,*" after "*have.*"
410, l. 11, after the word "*to*" read "*be.*"
414, l. 7 from the bottom, after "*accepted,* read "*for the accommodation of the defendant.*"

IN VOLUME SECOND.

Page 23, line 2 from the bottom, inſtead of "*looſe*" read "*to loſe.*"
30, l. 17, after "*an,*" read, "*action of.*"
40, l. 9 from the bottom, after "*learned*" read "*judge.*"
42, laſt line, dele "*in his own wrong.*"
87, l. 7, after "*Return,*" read "*of.*"
130, l. 4 from the bottom, for "*here*" read "*there.*"
144, l. 20, for "*Alimbrook*" read "*Alcinbrook.*"
158, l. 20, dele "*and,*" and read "*which were.*"
186, l. 24, for "*whole*" read "*old.*"
256, l. 2 from the bottom, after the word "*in*" dele "*the.*"
6 from the bottom, for "*principal*" read "*original.*"
353, l. 5, inſtead of "*in*" read "*to a.*"
354, l. 14, dele "*a.*"
504, l. 10 from the bottom, for "*are*" read "*is.*"

THE

THE

LAW OF CONTRACTS.

PART THE FIRST.

OF THE

NATURE AND REQUISITES OF A CONTRACT AND AGREEMENT BY PAROL.

CHAPTER I.

Of the Nature of a Contract and Agreement by Parol; and of Expreſs and Implied Contracts and Promiſes.

ALL Contracts are by the laws of *England* diſtinguiſhed into agreements by *ſpecialty*, and agreements by *parol*. If they be merely written, and not under ſeal, they are denominated contracts by parol (*a*).

As Contracts and Agreements between Merchants and others are moſt commonly entered into either verbally, or in writing without ſeal, the preſent work is wholly confined to contracts and agreements uſually denominated *parol*; and theſe alone, it may be obſerved, are the ſubject matter of the action of *aſſumpſit*.

(*a*) Per Ld. Ch. Baron *Skynner*, in the caſe of *Rann* v. *Hughes*, 7 Term Rep. 350 n. a.

Now a contract by *pact* is defined to be a bargain or agreement voluntarily made, either verbally, or in writing not under seal, upon a good consideration, between two or more persons capable of contracting, to do or forbear to do some lawful act; as if a man sells or exchanges cattle or goods for money or any other commodity; or agrees in consideration of a sum of money to make a lease of lands, or forbear to prosecute a legal claim, &c. (*b*) And these are valid contracts, because there is, what lawyers commonly term, *quid pro quo*, or one thing for another. But, if a man, without any consideration than mere good will, or natural affection, make a voluntary promise to give to another a sum of money, as for instance, 20*l.* and that he will be his debtor for that sum; this is no contract, but a mere naked promise or *nudum pactum*: for, however a man may or may not be bound to perform such a promise, in honour or conscience, which the municipal laws of this country do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio.* But any degree of reciprocity will prevent the *pact* or promise from being *nude*; and therefore, in the instance put, if any thing, however trifling, were done, or to be done or given for the 20*l.*, it would be a valid contract, and binding upon the parties (*c*).

The definition of an agreement is thus given in our law books: "An agreement is, *aggregatio mentium, viz.* when two or more "minds are united in a thing done or to be done, or where a mu- "tual assent is given to do or not to do a particular act (*d*)." And it is observed, (*e*) that every contract and agreement ought to be so certain and complete that each party may have an action or other remedy upon it.

Now in order to render a contract or agreement certain and complete, six things appear necessary to concur; 1. A person able to contract; 2. A person capable to be contracted with; 3. A thing to be contracted for; 4. A good and sufficient consideration

(*b*) *Note*, a bond, or other instrument in writing under seal, is termed a contract by *specialty*.

(*c*) *Vide Termes de Ley*, tit. Contract. Bro. Abr. tit. Contract. pl. 34. Pl. Com. 302. 2 Bl. Com. 445.

(*d*) Com. Dig. tit. Agreement. A. 1. Pl. Com. 5. 17. 5 East, 16.

(*e*) Pl. Com. 5.

or

or *quid pro quo*; 5. Clear and explicit words to expreſs the contract or agreement; 6. The aſſent of both the contracting parties (*f*). So, every contract ſhould be obligatory on both the contracting parties, or both ſhould be at liberty to recede therefrom (*g*). But to an agreement or contract, there is not any preſcribed form of words; but any words which ſhow the aſſent of the parties are ſufficient (*h*).

A contract or agreement conveys an intereſt either in *poſſeſſion*, or in *action*; as if A. agrees to change horſes with B., and they do it immediately; or if goods are ſold and delivered and paid for at one time; here the poſſeſſion and the right are transferred together; and ſuch contract or agreement being executed and complete, is commonly termed an *executed* contract. But where A. for a valuable conſideration contracts with B. to pay him 100*l.* at a day to come; in this caſe, though A. thereby transfers a property or intereſt in ſuch ſum to B. yet ſuch property or intereſt is not in *poſſeſſion*, but in *action* merely, and recoverable by ſuit at law; and the contract not being performed, is therefore uſually denominated an *executory* contract (*i*).

Of Expreſs Contracts or Promiſes.

Contracts and agreements without ſeal are either expreſſed or implied. *Expreſs* contracts are where the terms of the bargain, agreement, or promiſe, are openly uttered and expreſſed by the contracting parties themſelves. The ſubject matter of this claſs of contracts relates either to the perſon or property of the contractors, and may be either to do or forbear to do a particular act; as, to pay money on the ſale or exchange of cattle or goods; to pay rent for the uſe and occupation of lands or houſes; to pay money on particular mercantile ſecurities or agreements; to pay the debt of a third perſon; to pay money won or loſt at play; to perform works; to accept, deliver, or take back goods, &c.; to accept, transfer, or replace ſtock; to let or take lands or houſes; to warrant the title to lands; to warrant the ſoundneſs or quality of

(*f*) *Vide* Pl. Com 161. Co. Lit. 35. (*b*).
(*g*) 3 Term Rep. 653. (*h*) Pl. Com. 150.
(*i*) 2 Bl. Com. 443.

cattle or goods; to indemnify; to marry; to forbear to ſue; not to trade within a particular diſtance, &c.

Expreſs contracts or promiſes ought to be certain and explicit; but certainty to a common intent is ſufficient (*k*): as if a man promiſes another, in conſideration that he will aſſign to him a certain term, to pay him 10*l.* this is a good *aſſumpſit*, though the time of the aſſignment and the payment be not appointed; for the 10*l.* ſhall be paid in a convenient or reaſonable time after the aſſignment, which alſo muſt be made within a reaſonable time after the agreement (*l*).

So, if A. be indebted to B. for certain things to him ſold, and C. comes to B. and, for a good conſideration, promiſes him, that if A. ſhould not pay him the money, he will pay it for him; an action upon the caſe lies for B. againſt C. upon this promiſe, if A. does not pay the money within a convenient or reaſonable time; for ſo ſhall the promiſe be taken, *viz.* that if A. does not pay it in a convenient time, that then C. will pay it for him (*m*).

So, where A., in conſideration that B. would marry his daughter, promiſed to give with her a child's part; and that, at the time of his death, he would give to her as much as to any of his children, except his eldeſt ſon; this was holden to be a good promiſe: for though a child's part is in itſelf altogether uncertain, yet, it being ſhown what the reſt of the children had, except the eldeſt, it is then reduced to a ſufficient certainty (*n*).

But if a citizen of *London* promiſes a child's portion, this of itſelf is certain enough; for by the cuſtom there it is known how much each child ſhall have (*o*).

So, an *aſſumpſit* to give a bond for 40*l.* without ſaying in *what penalty*, is good; for it ſhall be intended double the ſum (*p*).

But, where the plaintiff declared that, whereas there was a communication between him and the defendant concerning the bark of certain wood, and that thereupon it was agreed, that the

(*k*) Com. Dig. tit. Action of *Aſſumpſit*, A. 3. 4.
(*l*) 1 Rol. Abr. 14. l. 50. (*m*) 1 Rol. Abr. 15. l. 5.
(*n*) *Silveſter*'s caſe, Poph. 148. 2 Rol. Rep. 104. S. C.
(*o*) Per *Montague*, Ch. Juſt. 2 Rol. Rep. 104. (*p*) 1 Lev. 88.

defendant

defendant ſhould give to the plaintiff two ſhillings *per* ſeam for all the bark of ſuch wood as the plaintiff ſhould cut; and that the defendant aſſumed and promiſed to have ready upon a certain day articles in writing purporting that agreement, and an obligation for performance thereof, &c., the declaration was holden not to be good; becauſe it was not ſaid in what ſum the obligation was to be, and a certain ſum could not be intended, becauſe the number of ſeams were altogether uncertain (*q*).

No expreſs contract or agreement can be raiſed from a mere caſual ſpeaking or declaration in diſcourſe; as, if there be a diſcourſe between the father of A. and B. in relation to a marriage between A. and the daughter of B.; and B. in that diſcourſe declares and publiſhes to the father of A. *that he would give to him who ſhould marry his daughter with his conſent* 100*l.* and A. after this declaration marries the daughter of B. with his conſent; yet it was holden, that this declaration and publication of B. ſhall raiſe no promiſe upon which an action of *aſſumpſit* may be brought; for theſe general words do not include any promiſe; and the agreement muſt be complete upon which an expreſs *aſſumpſit* lies (*r*).

Of Implied Contracts or Promiſes.

Implied contracts or promiſes are ſuch as reaſon and juſtice dictate, and which, therefore, the law preſumes that every man undertakes to perform. As, if a perſon is employed by another to do any buſineſs for him, or perform any work, and nothing is agreed upon as to the price of his labour, the law implies that the employer undertook or contracted to pay the perſon ſo employed as much as he reaſonably deſerves for his labour. So, where a man orders goods of a tradeſman without any agreement as to price, the law concludes that the buyer contracted to pay to the ſeller their real value (*s*).

From hence it may be collected that all implied contracts or promiſes are founded on ſome legal liability to pay a debt, or perform

(*q*) *Pleaſe* v. *Palſry*, 1 Sid. 270. 1 Keb. 756. S. C.

(*r*) 1 Rol. Abr. 6. l. 40. 1 Bac. Abr. 26. Com. Dig. tit. Action of *Aſſumpſit*. F. 2.

(*s*) 2 Bl. Com. 443. But ſee Ld. Raym. 538. 6 Mod. 250.

a duty. Therefore, beſides the inſtances juſt mentioned, when money is lent and advanced, paid, laid out, and expended, or had and received; and nothing is expreſsly ſtipulated by the parties, as to the repayment thereof, the law raiſes an *implied* promiſe that it ſhall be repaid upon requeſt. So, when money is due on an account ſtated; or for fines on admiſſions into copyhold premiſes for fines and duties payable to corporations; for fees payable to particular officers; for petty cuſtoms and tolls; for general average; for the ſalvage of ſhip or goods; for the carriage or wharfage of goods, for money due on awards, or foreign judgments: So alſo, as between landlord and tenant, that the latter ſhall uſe his farm, &c. in a huſband-like and proper manner. In theſe inſtances alſo, and various others which might be mentioned, though no expreſs agreement be made, a legal liability ariſes; and the law preſumes that the party promiſed to pay the debt, or perform the duty.

The laſt claſs of contracts, implied by reaſon and conſtruction of law, ariſes upon this ſuppoſition, that every one who undertakes any office, employment, truſt, or duty, contracts with thoſe who employ or entruſt him, to perform it with integrity, diligence, and ſkill. And, if by his want of either of thoſe qualities any injury accrues to individuals, they have therefore their remedy in damages by action. A few inſtances will fully illuſtrate this matter. If a ſurgeon, attorney, or any other profeſſional perſon is guilty of neglect of duty, or a palpable breach of it, he is liable to an action on an implied *aſſumpſit* or promiſe for a reparation in damages for the injury ſuſtained in conſequence of ſuch neglect. There is alſo in law always an *implied* contract with a common inn-keeper, common carrier, wharfinger, warehouſe-keeper, or other bailee to be anſwerable for the goods entruſted to their care; with a common farrier that he ſhoes a horſe well without laming him; with builders and other workmen that they perform their buſineſs in a workmanlike manner; in which if they fail, an action on the caſe either in *tort* or *aſſumpſit* lies to recover damages for ſuch breach of their general undertaking. But if a perſon is employed to tranſact any of theſe concerns whoſe common profeſſion and buſineſs it is not, the law implies no ſuch *general* undertaking; but in order to charge him with damages an *expreſs* agreement is required (*t*).

(*t*) Vide 3 Bl. Com. 165.

It

It is difficult to ſtate with certainty what contracts and promiſes are excluſively implied; though, as a general rule, it may be obſerved, that promiſes in law only exiſt where there is no expreſs ſtipulation between the parties (*u*).

Who may contract, &c.

The parties to a contract are two or more, namely, the perſon or perſons who contract the obligation to do or forbear to do a particular act, and the perſon or perſons in whoſe favour it is contracted.

Generally ſpeaking, all perſons, except infants and married women, having capacity and underſtanding, may, by mutual aſſent, become parties to a contract, and bind themſelves and their perſonal repreſentatives to a performance thereof (*v*). In ſome caſes indeed, as will be ſhown in a ſubſequent part of this work, infants and married women may legally enter into a contract.

Contracts and agreements are entered into by individuals either for themſelves or third perſons; and the liability of the parties thereto muſt wholly depend upon the general nature and terms of the contract. Thus, where A. B. and C. on behalf of themſelves and other members of a club, entered into articles of agreement with D. to provide neceſſaries for the uſe and accommodation of the club; it was holden that the three were perſonally bound by ſuch articles; and that D. was not obliged to reſort to any of the other members for ſatisfaction of his demands (*w*).

In this chapter, however, it is not neceſſary to dwell further on theſe points, as they will come under a more diſtinct and particular conſideration in the ſecond part of this work.

(*u*) *Per Buller*, Juſt. 2 Term Rep. 105.
(*v*) Vide 1 Bac. Abr. tit. Agreements. *A.*
(*w*) Duke of *Queenſbury* and others v. *Cullen*, 1 Bro. Parl. Caſ. 396. 8vo ed.

CHAPTER II.

Of the Conſideration neceſſary to ſupport a Contract or Agreement.

IT is eſſential to every contract or agreement that it be founded upon a good conſideration.

The civilians hold, that in all contracts, either expreſs or implied, there muſt be ſomething given in exchange, ſomething that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the conſideration: and it muſt be a thing lawful in itſelf, or elſe the contract is void.

A contract for any *valuable* conſideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of ſufficient adequate value, is never ſet aſide in equity: for the perſon contracted with has then given an equivalent in recompence, and is therefore as much an owner, or a creditor, as any other perſon (*a*).

Theſe conſiderations are ſaid (*b*) to be divided by the civilians into four ſpecies. 1. *Do, ut des:* as when I give money or goods on a contract, that I ſhall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promiſe of repayment; and all ſales of goods, in which there is either an expreſs contract to pay ſo much for them, or elſe the law implies a contract to pay ſo much as they are worth. 2. The ſecond ſpecies is, *facio, ut facias:* as, when I agree with a man to do his work for him, if he will do mine for me; or if two perſons agree to marry together; or to do any other poſitive acts on both

(*a*) 2 Bl. Com. 444.
(*b*) Ibid. See alſo Treat. of Eq. b. 1. c. 5. ſ. 2. n. a.

ſides.

fides. Or, it may be to forbear on one fide on conſideration of ſomething done on the other; as, that in conſideration A., the tenant, will repair his houſe, B., the landlord, will not ſue him for waſte. Or, it may be for mutual forbearance on both ſides; as, that in conſideration that A. will not trade to *Liſbon*, B. will not trade to *Marſeilles*; ſo as to avoid interfering with each other. 3. The third ſpecies of conſideration is *facio, ut des*: when a man agrees to perform any thing for a price, either ſpecifically mentioned, or left to the determination of the law to ſet a value on it. And when a ſervant hires himſelf to his maſter for certain wages, or an agreed ſum of money: here the ſervant contracts to do his maſter's ſervice, in order to earn that ſpecific ſum. Otherwiſe, if he be hired generally; for then he is under an *implied contract* to perform this ſervice for what it ſhall be reaſonably worth. 4. The fourth ſpecies is, *do, ut facias*: which is the direct counterpart of the preceding. As when I agree with a ſervant, to give him ſuch wages upon his performing ſuch work: which, we ſee is nothing elſe but the laſt ſpecies inverted: for *ſervus facit, ut herus det*, and, *herus dat, ut ſervus faciat*.

A conſideration of ſome ſort or other is ſo abſolutely neceſſary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one ſide, without any compenſation on the other, is totally void in law; and a man cannot be compelled to perform it (*c*).

But it is obſerved, (*d*) as this rule was principally eſtabliſhed, to avoid the inconvenience that would ariſe from ſetting up mere verbal promiſes, for which no good reaſon could be aſſigned, it therefore does not hold in ſome caſes, where ſuch a promiſe is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promiſſory note, he ſhall not be allowed to aver the want of a conſideration in order to evade the payment: for every bond from the ſolemnity of the inſtrument, and every note from the ſubſcription of the drawer, carries with it an internal evidence of a good conſideration. Courts of juſtice will therefore ſupport them both, as againſt the contractor himſelf; but not to the prejudice of creditors, or ſtrangers to the contract.

(*c*) 2 Bl. Com. 445. (*d*) Ibid.

This

This obſervation, as far as it reſpects promiſſory notes, and other written contracts not under ſeal, is certainly ſupported by the opinion of Mr. Juſtice *Wilmot*, in the caſe of *Pillans* v. *Van Mierop* (*e*), who ſaid, "I cannot find that a *nudum pactum* evidenced by "writing has been ever holden bad: and I ſhould think it good; "though where it is merely *verbal*, it is bad. Yet I give no opi- "nion upon its being good, always, when in writing."

The law, however, on this point is now ſettled; and the rule is, that a verbal agreement, or promiſe, though reduced into writing, is not valid, unleſs a conſideration be proved.

Thus, in the caſe of *Rann* and another, executors of *Mary Hughes*, v. *Iſabella Hughes*, adminiſtratrix of *J. Hughes*, in error (*f*), the declaration ſtated, that on the 11th *June* 1764, divers diſputes had ariſen between the plaintiff's teſtator and the defendant's inteſtate, which they referred to arbitration; that the arbitrator awarded that the defendant's inteſtate ſhould pay to the plaintiff's teſtator 983*l.* That the defendant's inteſtate afterwards died poſſeſſed of effects ſufficient to pay that ſum; that adminiſtration was granted to the defendant; that *Mary Hughes* died, having appointed the plaintiffs her executors; that at the time of her death the ſaid ſum of 983*l.* was unpaid, "by reaſon of which premiſes the defen- "dant as adminiſtratrix became liable to pay to the plaintiffs as exe- "cutors the ſaid ſum, and being ſo liable ſhe in conſideration "thereof undertook and promiſed to pay, &c."

The defendant pleaded *non aſſumpſit*; *plenè adminiſtravit*; and *plenè adminiſtravit*, except as to certain goods, &c. which were not ſufficient to pay an outſtanding bond debt of the inteſtate's therein ſet forth, &c. The replication took iſſue on all theſe pleas. Verdict for the plaintiff on the firſt iſſue, and for the defendant on the two laſt; and on the firſt, a general judgment was entered in the Court of *King's Bench* againſt the defendant *de bonis propriis*. This judgment was reverſed in the *Exchequer* chamber; and a writ of error was afterwards brought in the *Houſe of Lords*, where, after argument, the following queſtion was propoſed to the Judges by the Lord *Chancellor*, "Whether ſufficient matter appeared upon the

(*e*) 3 Bur. 1671.
(*f*) 7 Term Rep. 350 n. a. Dom. Proc. 14 *May* 1778.

"declaration

" declaration to warrant after verdict the judgment against " the defendant in error in her personal capacity?" Upon which the Lord Chief Baron *Skynner* delivered the opinion of the Judges to this effect.—" It is undoubtedly true that every man is by the " law of nature bound to fulfil his engagements. It is equally " true that the law of this country supplies no means, nor af- " fords any remedy to compel the performance of an agreement " made without sufficient consideration; such agreement is *nudum* " *pactum ex quo non oritur actio*; and whatsoever may be the sense of " this maxim in the civil law, it is in the last-mentioned sense " only that it is to be understood in our law. The declaration states " that the defendant being indebted as administratrix, promised to " pay when requested, and the judgment is against the defendant " generally. The being indebted is of itself a sufficient considera- " tion to ground a promise, but the promise must be coextensive " with the consideration unless some particular consideration of " fact can be found here to warrant the extension of it against the " defendant in her own capacity. If a person indebted in one " right, in consideration of forbearance for a particular time pro- " mise to pay in another right, this convenience will be a sufficient " consideration to warrant an action against him or her in the " latter right: but here no sufficient consideration occurs to support " this demand against her in her personal capacity; for she derives " no advantage or convenience from the promise here made. For " if I promise generally to pay upon request, what I was liable to " pay upon request in another right, I derive no advantage or " convenience from this promise, and therefore there is not sufficient " consideration for it. But it is said that if this promise is in writ- " ing, that takes away the necessity of a consideration, and obviates " the objection of *nudum pactum*, for that cannot be where the pro- " mise is put in writing; and that after verdict, if it were neces- " sary to support the promise that it should be in writing, it will, " after verdict, be presumed that it was in writing: and this last is " certainly true; but that there cannot be *nudum pactum* in writing, " whatever may be the rule of the civil law, there is certainly " none such in the law of *England*." His Lordship observed upon the doctrine of *nudum pactum* delivered by Mr. J. *Wilmot* in the case of *Pillans* v. *Van Mierop*, 3 Burr. 1663, " that he contra- " dicted himself, and was also contradicted by *Vinnius*, in his " comment on *Justinian*." All contracts are by the laws of *England* distinguished into agreements by specialty, and agreements by

by parol; nor is there any ſuch third claſs, as ſome of the Counſel have endeavoured to maintain, as contracts in writing. If they be merely written and not ſpecialties, they are parol, and a conſideration muſt be proved. But it is ſaid that the ſtatute of frauds has taken away the neceſſity of any conſideration in this caſe; the ſtatute of frauds was made for the relief of perſonal repreſentatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordſhip here read thoſe ſections of that ſtatute which relate to the preſent ſubject. He obſerved, that the words were merely negative, and that executors and adminiſtrators ſhould not be liable out of their own eſtates, unleſs the agreement upon which the action was brought, or ſome memorandum thereof, was in writing and ſigned by the party. But, ſaid his Lordſhip, this does not prove that the agreement was ſtill not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converſe of the propoſition that when in writing the party muſt be at all events liable. He here obſerved upon the caſe of *Pillans* v. *Van Mierop*, in Burrow, and the caſe of *Loſh* v. *Williamſon*, *Mich.* 16 G. 3. in B. R.; and ſo far as theſe caſes went on the doctrine of *nudum pactum*, he ſeemed to intimate that they were erroneous. He ſaid, " that all his Brothers con-
" curred with him, that in this caſe there was not a ſufficient con-
" ſideration to ſupport this demand, as a perſonal demand againſt
" the defendant, *and that its being now ſuppoſed to have been in writ-*
" *ing* makes no difference. The conſequence of which is, that
" the queſtion put to us muſt be anſwered in the negative."

The ſame rule alſo applies to promiſſory notes and bills of exchange, as well as to all other contracts in writing without ſeal. This rule, however, extends only to the immediate parties to a bill or note, and does not affect third perſons, who happen to be ſtrangers to the want of conſideration as between thoſe parties. For inſtance, if an action be brought upon a note or bill, at the ſuit of the payee againſt the drawer, or, by the indorſee againſt the indorſer, for which no conſideration was given, the plaintiff, in either caſe, cannot recover.

But the want of conſideration, as between the maker and payee of a note or bill, cannot be ſet up in an action againſt either of them at the ſuit of an indorſee, unleſs it be proved, that he was acquainted

quainted with this circumſtance at the time of taking the note or bill (*g*).

The reaſon why third perſons ought not to be affected by this rule is, that bills and notes being negotiable inſtruments, by mere indorſement and delivery, it would be enabling the original parties to aſſiſt in a fraud, if they were to be allowed to ſet up the want of conſideration, as between themſelves, in bar to an action againſt either of them, at the ſuit of an indorſee for a valuable conſideration.

Lord *Mansfield* is reported (*h*) to have ſaid that "in commercial "caſes amongſt merchants, the want of conſideration is not an "objection." But this obſervation, it is apprehended, muſt be underſtood to apply only to caſes of bills and notes when in the hands of an indorſee. For in all other contracts and agreements, not under ſeal, whether mercantile or otherwiſe, a conſideration is abſolutely neceſſary. Indeed, a bargain without a conſideration is ſaid to be a contradiction in terms, and cannot exiſt (*i*).

I now proceed to ſhow what conſideration is neceſſary to ſupport a contract or agreement.

It is a known rule of law, that to make a contract or agreement obligatory the conſideration muſt be either a benefit to the party promiſing, or ſome trouble or prejudice to the party to whom the promiſe is made; otherwiſe the contract or agreement is conſidered as *nudum pactum*, and cannot be enforced (*k*).

Thus, a *promiſe in conſideration of the forbearance of a ſuit for a certain time, is good*; for that is for the benefit of the defendant, though the action is not diſcharged (*l*). But, a promiſe in conſideration of forbearance is not valid where there was originally no cauſe of action; as, in conſideration of forbearance of a ſuit upon a con-

(*g*) Vide 7 Mod. 13. Stra. 674. 2 Term Rep. 71. 1 Eſp. Rep. 117. 261. Bayley on Bills, 121, 2 Ed. Chitty on Bills, 9. 51. Fonbl. Treat. of Eq. 1 V. 343. 2 Ed.

(*h*) 3 Burr. 1669.

(*i*) Per Lord *Loughborough*, in the caſe of *Middleton* v. Ld. *Kenyon*, 2 Veſ. jun. 498.

(*k*) Com. Dig. tit. Action on the caſe upon *Aſſumpſit*, B. 1.

(*l*) Vide Cro. El. 543, 544. 548. vide *poſt*, Part III.

tract

tract made by a married woman (*m*). A promiſe *in conſideration of ſurceaſing of a ſuit is good;* for that is a benefit to the defendant, and a prejudice to the plaintiff, though the action is not diſcharged (*n*).

So, in conſideration of the diſcharge of a debt, or the delivery of a bond, or other ſecurity (*o*).

So, *in conſideration of the proof of a debt,* for it is a charge to the plaintiff; as, if an executor promiſe, in conſideration of the proof of the delivery of goods to his teſtator, to pay for them (*p*). So, if the parties agree to a particular manner of trial of the validity of a debt, it ſhall be determined in ſuch manner (*q*).

So, *in conſideration of any particular ſervice or labour by the party to whom the promiſe is made;* as, to procure the enjoyment of a houſe; (*r*) or to procure a note, &c. from the debtor of the party promiſing (*s*).

Or, in conſideration that the plaintiff would act for the defendant as a commiſſioner to examine witneſſes (*t*).

So, *in conſideration of permiſſion given to do an act;* as, to permit a wife to take out adminiſtration *durante minori ætate* of her ſon; for it does not belong to her (*v*).

So, in conſideration of leave of abſence from a regiment for a reaſonable time (*x*).

So, in *conſideration of any other act, by which the defendant has benefit;* as, in conſideration that the plaintiff would deliver to the defendant certain goods, in which the plaintiff had only a ſpecial property; for the defendant has a benefit by the preſent poſſeſſion (*y*).

So, in conſideration of the releaſe of an equity of redemption (*z*).

So, a promiſe in conſideration of the aſſignment of an uncertain debt (*a*).

So, a promiſe to accept a bill in conſideration of the acceptance of another of equal amount (*b*).

(*m*) Stra. 94.
(*n*) Hob. 216. 1 Rol. Abr. 19. l. 20. 30. 2 Bulſt. 41. Pal. 394.
(*o*) Com. Dig. tit. Action upon *Aſſumpſit*, B. 3.
(*p*) 1 Leon. 93. 1 Sid. 57. 369. T. Ray. 32. 153. Cro. El. 67.
(*q*) 3 Lev. 241. (*r*) Yelv. 11. (*s*) 2 Vent. 71. 74.
(*t*) Show. 342. (*v*) 1 Rol. Abr. 21. l. 30. (*x*) 1 Ld. Raym. 312.
(*y*) Cro. El. 218. *Vide* Yelv. 4. 50. 128. (*z*) Ld. Raym. 662.
(*a*) 2 Bl. Rep. 820. (*b*) 7 Term Rep. 569. 2 H. Bl. 570.

So, in *consideration of marriage*; as, upon a communication of a marriage, a cousin of the husband promises the wife to give her 100*l.* if the husband's father does not assure such land (*c*).

So, a discharge of a promise of marriage by a woman to a man is a good consideration (*d*).

So, in *consideration of the voluntary performance of an act, which the plaintiff was compellable to perform*; as, if the plaintiff will discharge a debt, for which he and the defendant are sureties, the defendant will repay the moiety (*e*).

So, a promise to cancel a bond in consideration that the obligee will pay the single sum due upon it (*f*).

Of Mutual Promises.

A promise for promise is a good consideration; as in consideration of a reciprocal promise of marriage.

Thus, in the case of *Hebden* v. *Rutter* (*g*), the plaintiff declared, that in consideration that she promised to marry the defendant, the defendant promised to marry the plaintiff: and averred that the plaintiff requested the defendant to marry, but the defendant refused, &c. And to this declaration the defendant demurred. And it was said, that there was not any consideration; for marriage is a matter merely spiritual, and no ground for *assumpsit* at common law. *Sed per Curiam*, "the declaration and consideration in this case "are good; for marriage is a preferment, and the loss of it is a tem-"poral loss."

So, where one *Nichols* brought an action of *assumpsit* against *Raynbred*, declaring that in consideration, that *Nichols* promised to deliver to *Raynbred* a cow, *Raynbred* promised to deliver him 50*s*. This was adjudged a sufficient consideration, it being promise for promise (*h*).

It is observed that mutual promises must be made at the same time, otherwise they will be *nuda pacta* (*i*).

(*c*) Cro. El. 63, 4. Het. 50.
(*d*) 1 Rol. Abr. 470. l. 5. Sty. 295. 333. T. Raym. 220.
(*e*) 1 Rol. Abr. 20. l. 50. (*f*) Cro. Car. 8. 1 Mod. 30. Cro. El. 194.
(*g*) 1 Sid. 180. See also 1 Rol. Abr. 22. l. 5. 1 Lev. 127. Cart. 233. Mod. Cas. 155. 1 Salk. 24. 5 Mod. 411. Ld. Raym. 386. S. P.
(*h*) Hob. 88. See also Cro. El. 543. 703. 4 Leon. 3. Yelv. 154. 1 Wilf. 88. S. P. (*i*) Hob. 88.

We

We have before (*k*) ſeen that a conſideration of ſome ſort or other is ſo abſolutely neceſſary to the forming of a contract, that a *nudum pactum*, or agreement to pay any thing on one ſide, without any compenſation on the other, is actually void in law and a man cannot legally be compelled to perform it.

Therefore, if a man *gratuitouſly*, or in conſideration of *natural affection*, or of *friendſhip*, promiſes another to give him a ſum of money on a day to come, this is *nudum pactum*, and cannot be enforced at law. For though a gratuitous undertaking, ſeriouſly made, is certainly ſufficient, to form the baſis of a moral and honorary obligation, and ought not to be receded from without ſome adequate reaſon; yet, in general, a perſon making ſuch a promiſe does not thereby intend to ſubject himſelf to legal reſponſibility and the object of the law is rather to give effect to contracts founded upon the mutual exigencies of ſociety, than to compel the execution of a voluntary engagement of mere donation.

So, if one buy goods for money, and no money be paid, nor earneſt given, nor day ſet for payment, nor the goods, or any part of them, delivered; here no action lies for the money, or the goods ſold, but the owner may ſell them to another if he will; there being no conſideration, but a mere agreement to buy (*l*).

So, where A. having propoſed to ſell goods (*m*) to B. gave him a certain time at his requeſt to determine whether he would buy them or not; B. within the time determined to buy them, and gave notice thereof to A.; yet it was holden that A. was not liable to an action for not delivering them, for B. not being bound by the original contract, there was no conſideration to bind A.

So, where a carpenter had undertaken to build an houſe, and for the not doing it, the party brought an action againſt the carpenter, but becauſe it did not appear that he was to have any thing for building the houſe; it was adjudged that the action would not lie (*n*).

So, if the *conſideration be not beneficial to the party promiſing, nor any trouble or prejudice to the party to whom the promiſe is made*, it is not good: as if a promiſe be made by an executor, or an heir at

(*k*) Ante, 9. (*l*) Dy. 30. a. Bro. tit. Contract. Shep. Touch. 224.
(*m*) 3 Term Rep. 653.
(*n*) 1 Rol. Abr. 9. l. 40. Pl. Com. 309. See alſo 2 Ld. Raym. 919. 5 Term Rep. 143. 149.

law,

law who has no assets, in consideration of forbearance, to pay the debt of the testator (*o*).

So, if an heir promise in consideration of the forbearance of a suit in *Chancery*, to which he was not liable (*p*).

So, if a man promise payment to an assignee, in consideration that he will accept him for his debtor (*q*).

So, in consideration of relinquishing an *assumpsit*, which was void; (*r*) or, in consideration of a discharge from a tortious arrest (*s*).

So, if a woman after the death of her husband promise, in consideration that the plaintiff, a creditor of her late husband, will permit her to take out administration to her husband, she will pay him his debt; this is not a valid consideration; for the administration belongs to the wife (*t*).

So, in consideration of a lease at will, for he may determine it at his pleasure (*u*).

But if there be any benefit, labour, or prejudice, however trifling, it is deemed a sufficient consideration.

Thus, in the case of Sir *Anthony Sturlyn* v. *Albany* (*x*), the plaintiff had made a lease to J. S. of land for life rendering rent; J. S. granted all his estate to the defendant; the rent was behind for several years; the plaintiff demanded the rent of the defendant, who promised, that if the plaintiff could show to him a deed that the rent was due, he would pay to him the rent and arrearages: the plaintiff alleged that on such a day, &c. he showed the defendant the indenture of lease by which the rent was due; but notwithstanding this, the defendant refused to pay the rent and arrearages due for four years; and for the recovery thereof, the action was brought. A motion was made in arrest of judgment, that there was no consideration to ground an *assumpsit*; for the mere showing of the deed is no consideration in law. But the court gave judgment for the plaintiff upon this ground, that when a thing is to be done by the party to whom the promise is made, be it never so small, this is a sufficient consideration to support an action; and here the showing of the deed was to

(*o*) Mo. 782, 3. 1 Rol. Abr. 28. l. 35. (*p*) Cro. El. 206.
(*q*) 1 Saund. 210. (*r*) 1 Rol. Abr. 26. l. 10. (*s*) Yelv. 25, 6.
(*t*) Mo. 685. 1 Leon. 240. (*u*) 1 Rol. Abr. 23. l. 37.
(*x*) Cro. El. 67: 150.

avoid a ſuit.—The Reporter makes the following note: "In this "caſe it was alleged, that it had been adjudged, when one "aſſumeth to another, that if he can ſhow him an obligation "in which he was bound to him, that he would pay him, and "he did ſhow the obligation, &c. that no action lieth upon this "*aſſumpſit*; which was affirmed by the juſtices."

So, in *Foſter* v. *Scarlett* (*y*), the plaintiff declared, that whereas he and one *Willington* ſubmitted themſelves to the arbitrament of A. and B. of all matters, &c.; that A and B. awarded the plaintiff ſhould releaſe to *Willington* all debts which he owed him; and that *Willington* ſhould aſſure to the plaintiff certain lands which he held for life, the reverſion to the plaintiff; and that the defendant and one *Putter*, who pretended to have a leaſe of the lands, ſhould ſeal a deed to the plaintiff, that they ſhould aſſure to the plaintiff their leaſe and intereſt in the ſaid lands: that after the arbitrament, in conſideration that the plaintiff did aſſume to *Willington* to ſtand to and perform the arbitrament, the defendant did aſſume, that he and *Putter*, upon a requeſt made to them, would convey the ſaid land to the plaintiff. the plaintiff averred that he had performed the award on his part, and had requeſted the defendant that he and *Putter* would convey the land, &c. which they had not done.—It was moved in arreſt of judgment that there was no conſideration to bind the defendant, for he took no benefit thereby. But the Court held clearly the contrary, that it was a good conſideration; for by reaſon of the promiſe the plaintiff was drawn to make the releaſe, and it is not material that the defendant took no benefit by the releaſe.

So, the common law, in ſome caſes, conſiders the mere entruſting a thing with another, and his undertaking the care of it, a ſufficient conſideration for his faithful diſcharge of the truſt. And therefore, though a perſon who gratuitouſly engages to do an act for another, is not liable in law to an action for not doing it; yet if goods are delivered to him, and he undertakes to carry them, or do ſomething about them without any reward, an action of *aſſumpſit* will lie on this bailment, if there be any neglect on the part of the bailee by which the goods are ſpoiled.

(*y*) Cro. El. 70.

This

This was one of the points settled in the case of *Coggs* v. *Bernard*, (z) which was an action of *assumpsit*, wherein the plaintiff declared, that, whereas the defendant undertook safely and securely to take up several hogsheads of brandy, then in a certain cellar in D. and safely and securely to lay them down again in a certain other cellar in W. but that the said defendant and his servants so negligently and improvidently put them down again into the said other cellar, that for want of care in the defendant and his servants, one of the casks was staved, and a great quantity of brandy was lost. A motion was made in arrest of judgment, because it was not alleged, in the declaration, that the defendant was a common porter, nor averred that he had any thing for his pains. But to the second objection "that there was no considera-"tion to ground the promise, and that the undertaking was *nudum* "*pactum*," *Holt*, Chief Justice, and the rest of the court, answered, that the owner's trusting the defendant with the goods, was a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from one place to the other such a day, the defendant had not been bound to carry them; but this was a different case; for *assumpsit* did not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing.

And upon the same principle, it was holden (a), that if a carpenter undertakes to build or repair an house, and he does it unskilfully, an action on the case will lie against him for his misfeazance, though no consideration be alleged.

Of a past or executed Consideration.

If the consideration is wholly past and executed, it will not support a subsequent promise, unless the consideration was executed either at the express or implied request of the party promising. For it is not reasonable that one man should do another

(z) Ld. Raym. 909. *Et vide post*, Part 3. tit. Bailment of Goods.
(a) Rol. Abr. 9. l. 50. Ld. Raym. 919, 920. 5 Term Rep. 149.

a kindneſs, and then charge him with a recompence: this would be obliging him whether he would or not, and bringing him under an obligation without his concurrence.

Thus, in the caſe of *Hunt* v. *Bate*; (*b*) the ſervant of a man was arreſted and impriſoned in the Compter in *London* for a treſpaſs; and he was let to mainprize by the manucaption of two citizens of *London* (who were well acquainted with the maſter), in conſideration that the buſineſs of the maſter ſhould not go undone. And afterwards, before judgment and condemnation, the maſter, upon the ſaid friendly conſideration, promiſed and undertook to one of the mainpernors to ſave him harmleſs againſt the party plaintiff, from all damages and coſts, if any ſhould be adjudged, as happened afterwards in reality; after this the ſurety was compelled to pay the condemnation, amounting to thirty-one pounds, &c. And thereupon he brought an action on the caſe, and the undertaking was traverſed by the maſter, and found in *London* at *niſi prius* againſt him. But it was afterwards moved in arreſt of judgment, that the action did not lie. And by the opinion of the court, "the action does not lie in this matter, becauſe there is no conſideration wherefore the defendant ſhould be charged for the debt of his ſervant, unleſs the maſter had firſt promiſed to diſcharge the plaintiff before the enlargement, and mainprize made of his ſervant, for the maſter did never make requeſt to the plaintiff for his ſervant ſo much, but he did it of his own head." Wherefore judgment was given for the defendant.

But, in the ſame report, it is added, that in another like action brought upon a promiſe of twenty pounds made to the plaintiff by the defendant, in conſideration that the plaintiff, *at the ſpecial inſtance of the ſaid defendant*, had taken to wife the couſin of the defendant; it was holden that this was a good conſideration, although the marriage was executed and paſt before the undertaking and promiſe, *becauſe the marriage enſued the requeſt of the defendant.*

So, in an action on the caſe, (*c*) in conſideration that the plaintiff, at the requeſt of the defendant, had taken ſuch a one apprentice, the defendant undertook that he ſhould ſerve truly, &c.

(*b*) Dy. 272. a.
(*c*) Hil. 36. Eliz. *Harris's* caſe, Dy. 272. a. n. 31.

and adjudged that this is a good consideration, although it were passed, because it was at the request of the defendant.

So, in consideration of one hundred and ten pounds given to a stranger, (*d*) at the instance of the defendant, the defendant undertook; and adjudged a good consideration, although it was passed, because it was at the instance of the defendant.

The distinction taken in these cases was agreed to by all the Justices, in *Sidenham* and *Worlington's* case, (*e*) which was an action of *assumpsit*, wherein the plaintiff declared, that he, *at the request of the defendant*, was surety and bail for J. S. who was arrested into the *King's Bench* upon an action of 30l. and that afterwards for the default of J. S. he was constrained to pay the 30l.; after which, the defendant, meeting with the plaintiff, promised him, for the same consideration, that he would repay that 30l., but which he afterwards refused; and for the recovery thereof this action was brought. It was objected that this consideration could not maintain the action, because the consideration and promise did not concur and go together. *Anderson*, Ch. J. said: "This action will not lie; for it is but a bare agreement, and *nudum pactum*, because the contract was determined, and not in *esse* at the time of the promise; but he said, it is otherwise upon a consideration of marriage, for marriage is always a present consideration." *Windham* agreed with *Anderson*, and he put the case in 3 H. 7. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warranty; for that such warranty ought to have been made or given at such time as the horse was sold: *Periam*, Justice, conceived that the action did well lie, and he said, "This case is not like unto the cases which have been put on the other side, for there is a great difference betwixt contracts and this case; for in contracts upon sale, the consideration, the promise, and the sale ought to meet together; for a contract is derived from *con* and *trahere*, which is a drawing together, so that in contracts every thing which is requisite ought to concur and meet together, *viz.* the consideration on the one side, and the sale or the promise on the other side. But to maintain an action upon an *assumpsit* the same is not requisite; for it is sufficient if there be a moving

(*d*) East. 38 Eliz. *Foster's* case, Dy. 272. a. n. 31.
(*e*) 2 Leon. 224.

cauſe or conſideration precedent, for which cauſe or conſideration the promiſe was made; and ſuch is the common practice at this day: for in an action on the caſe upon a promiſe, the declaration is laid, that the defendant for and in conſideration of 20l. to him paid, afterwards, that is to ſay, at a day after, *ſuper ſe aſſumpſit*, and that is good, and yet there the conſideration is laid to be executed. And he ſaid that the caſe of *Hunt* v. *Bate*, would prove the preſent caſe: for in that caſe it was adjudged that the action would not lie, becauſe the conſideration was precedent to the promiſe, and becauſe it was executed and determined long before. But it was holden by all the Juſtices, that if *Hunt* had requeſted *Bate* to have been ſurety or bail, and afterwards *Hunt* had made the promiſe upon that conſideration, the ſame had been good; for that the conſideration did precede, and was at the inſtance and requeſt of the defendant."—*Rhodes*, Juſtice, agreed with *Periam*, and he ſaid, "That if one ſerve me for a year and hath nothing for his ſervice, and afterwards, at the end of the year, I promiſe him 20l. for his good and faithful ſervice ended, he may have and maintain an action upon the promiſe; for it is made upon a good conſideration: but if a ſervant hath wages given him, and his maſter, *ex abundanti*, doth promiſe him 10l. after his ſervice ended, he ſhall not maintain an action for the 10l. becauſe there is not any new cauſe or conſideration *preceding* the promiſe;" which difference was agreed by all the Juſtices: and afterwards, upon good and long advice and conſideration had of the principal caſe, judgment was given for the plaintiff, and they much relied upon the caſe of *Hunt* and *Bate*.

So, in the caſe of *Townſend* v. *Hunt*, (*f*) where the plaintiff, at the requeſt of the defendant, had made a general releaſe to him and his wife (ſhe being executrix of F. T. under whoſe will the plaintiff claimed a legacy of 60l., 53l. of which he had been paid, and had afterwards executed the releaſe in queſtion), the defendant in conſideration thereof promiſed the plaintiff, that if his wife did not pay the ſeven pounds, reſidue of the legacy in her life time, he would pay it after his wife's death: It was holden, that though the promiſe was made after the releaſe, yet, foraſmuch as the releaſe was made at the defendant's requeſt, and the defendant had the benefit of it, the promiſe upon this conſideration was good enough.

(*f*) Cro. Car. 408.

So

So alſo, in the caſe of *Boſden* v. Sir *John Thinn*, (*g*) where the plaintiff declared, that whereas the defendant requeſted the plaintiff to give his credit for two tuns of wine for one *Roberts*, to one *Fludd*, amounting to 50*l.*; he thereupon gave his bond of 100*l.* for the payment of the 50*l.*, and for the non-payment thereof was ſued, and enforced to pay 70*l.*; and ſhewing this to the defendant, he, in conſideration of the premiſes, aſſumed to the plaintiff to pay the 70*l.*, &c.—It was moved, that this promiſe was not ſufficient, it being upon a conſideration paſt. But the court held, that the conſideration and promiſe were valid; becauſe *Roberts*, upon the plaintiff's undertaking at the defendant's requeſt, had credit given him by *Fludd*; and the plaintiff was damnified by reaſon thereof, which in conſcience the defendant ought to ſatisfy.

So, where a party derives benefit from a paſt conſideration, the law, in ſome inſtances, will raiſe an *implied requeſt*; as where a man pays a ſum of money, or buys any goods for me without my knowledge or requeſt, and afterwards I agree to the payment, or receive the goods, this is equivalent to a previous requeſt. (*h*)

So, in conſideration that the plaintiff had buried the defendant's ſon or wife, during the abſence or ſeparation of the father or huſband; this is good without any previous requeſt. (*i*)

Of a Conſideration executed in Part.

If a conſideration be executed in part only, and is continuing, it will ſupport a ſubſequent promiſe.

Thus, in the caſe of *Pearle* v. *Unger*, (*k*) which was an action of *aſſumpſit*, wherein the plaintiff declared, that he was poſſeſſed of certain lands for years, the defendant, in conſideration he had occupied the land, and had paid the rent to the defendant, *viz.* 30*l. per annum*, all the time he had occupied it, aſſumed to ſave

(*g*) Cro. Jac. 18. Yelv. 40.
(*h*) See 1 Saund. 264. n. 1. Str. 933. 2 Barnard Rep. 55. 71. 140. 3 Bur. 1671.
(*i*) T. Raym. 260. Dy. 272. a. n. b. Bul. N. P. 147. 1 H. Bl. 90.
(*k*) Cro. El. 94. 1 Leon. 102. S. C.

him harmleſs for the occupation of the land always during the term, as well for the years paſt as to come; and alleged that before the time of the promiſe, *viz.* ſuch a day, &c. his beaſts were taken *damage feaſant*, &c., and that the defendant had not ſaved him harmleſs of it. It was moved in arreſt of judgment, that there was no conſideration to maintain the action; for the conſideration and cauſe of the promiſe was a thing done before, *viz.* the occupation and payment of the rent; which being paſt, are no conſiderations for a thing future to be done.—But it was adjudged for the plaintiff; for the conſideration, that he was in poſſeſſion, and had paid his rent, and was to pay his rent, is ſufficient to cauſe the other to defend his poſſeſſion for the time paſt and to come.

So, where one being poſſeſſed of a ſhop (*l*) agreed to demiſe it to another, paying to him 40*s.* by the year, and 10*s.* for the laſt quarter; and for the perfecting the agreement each gave the other 1*s.*, and afterwards, in conſideration of the premiſes, the leſſee promiſed to give the leſſor 30*l.* and aſſumed to pay it; in conſideration whereof, and in performance of the contract, the leſſor made a leaſe to the leſſee accordingly; and the action was brought for the 30*l.*—It was objected that there was no good conſideration expreſſed to raiſe the promiſe for the 30*l.*, the ſame being grounded upon a conſideration that was paſt, perfect, and executed, and ſo no good conſideration. *Sed per curiam.* The leaſe here is made *after* the promiſe; the agreement is in performance of *all*, not of part; it was on the leſſee's part to make the leaſe to the defendant, and on his part to pay the rent of 40*s*; and the 30*l.* in conſideration of his quietly enjoying the ſame, which is a *valid promiſe*, founded upon a good and ſufficient conſideration.

So, in the caſe of *Wareſs* v. *Merſe* (*m*) the plaintiff declared, that in conſideration he had bought of the defendant three parcels of land on ſuch a day, the defendant afterwards on another day, promiſed to make him a ſufficient aſſurance. It was adjudged that the conſideration was not abſolutely paſt, for the aſſurance was the ſubſtance of the ſale.

(*l*) *Jones* v. *Clark*, 2 Bulſt. 73. Rol. Abr. 12. l. 5.
(*m*) Cro. El. 38.

So,

So, a promise on a consideration *executed* is good, if there were a duty before; as where the plaintiff declared that on such a day, the defendant was indebted to him in a certain sum, for divers goods sold to him; and for money lent; and also for money due upon an account stated; and being so indebted, the defendant in consideration thereof afterwards, on such a day promised to pay, &c. It was holden, that this is a good consideration to raise an *assumpsit*; for the continuance of the debt is a consideration continuing and sufficient to support an action. (*n*)

Of a Promise in Consideration of a precedent Debt or Duty voidable by Statute, &c.

Where a man is under a moral obligation, which no court of law or equity can enforce, and *promises*, the honesty and rectitude of the thing is a consideration: As, if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations: (*o*) or, if a man, after he comes of age, (*p*) promises to pay a meritorious debt contracted during his minority, but not for necessaries; or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; (*q*) or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds. (*r*)

In such, and many other instances, though the promise gives a compulsory remedy where there was none before either in law or equity; yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration. (*s*)

A subsequent promise, however, will revive that which is *voidable* only; therefore where the consideration is *void* in its creation, no promise can set it up again. As, if all the creditors of an insolvent consent to accept a composition for their demands on an

(*n*) *Hodge* v. *Vavisor*, 1 Rol. Rep. 413. Rol. Abr. 12. l. 30. ad. 45. 13 l. 45. *Johnson* v. *Astell*, 1 Lev. 198. Mo. 854.
(*o*) Ld. Raym 389. (*p*) Stra. 690. 1 Term Rep. 648.
(*q*) Cowp. 544. Doug. 101. n. 2 Term Rep. 765. Ni. Pri. Abr. 52.
(*r*) Cowp. 290.
(*s*) Per Lord *Mansfield*, Cowp. 290. See also 2 Bl. Com. 445. 3 Bos. and Pul. 249. n. a.

assignment

aſſignment of his effects by a deed of truſt, to which they are all parties, and one of them, before he executes, obtain from the inſolvent a promiſory note for the reſidue of his demand, as the condition of his executing the deed, the note is void in law, as a fraud on the reſt of the creditors; and a ſubſequent promiſe to pay it is a promiſe without conſideration, and will not maintain an action. (*t*)

Of a Conſideration void in Part.

If a contract or agreement be made upon two conſiderations, and one of them cannot be performed; this will not avoid the contract; and in an action thereon, the damages ſhall be intended to be wholly given for the good conſideration. (*u*)

As in conſideration of the aſſignment of a title to dower, and the not ſuing an attachment out of chancery upon a decree; though a title to dower cannot be aſſigned, but releaſed to the *terre*-tenant. (*v*)

So, in conſideration of a permiſſion to remove goods, and relinquiſh a foreign attachment, though it cannot be relinquiſhed. (*w*)

So, in conſideration of two things; and one of them is inſufficient; as, in conſideration of forbearance of a debt due from the defendant and his ſon; though, as to the debt of the ſon, it is of no value. (*x*)

And the void conſideration need not be proved. (*y*) But if one of the conſiderations is found falſe by the jury, the action fails. (*z*)

Or, if one of the conſiderations is unlawful, that vitiates the whole, and the plaintiff ſhall recover for nothing; as, in conſideration of 2*s*., and the eſcape of R.; for the permiting the eſcape is unlawful. (*a*)

(*t*) *Cockſhott* v. *Bennett*, 2 Term Rep. 763.
(*u*) Cro. El. 149. 1 Sid 38. Contra. 4 Leon. 3.
(*v*) Cro El. 847. 1 Rol. Abr. 30. l. 15. (*w*) Yelv. 56.
(*x*) 1 Sid. 38. T. Raym. 32.
(*y*) Com. Dig. tit. Action upon *Aſſumpſit*, B. 13.
(*z*) Cro. El. 848.
(*a*) Cro. El. 199. See alſo 1 Sid. 38. 4 Leon. 3. Cro. Jac 103.

Of

Of a Consideration arising from a third Person.

A promise, in some cases, is valid, though the consideration on which it is made arise in part from another; as if a man promise a pigg of lead to A. and his executor give lead for that purpose to B. who undertakes to deliver it to A.; an action lies by A. against B. upon his undertaking. (*b*)

So, in the case of *Dutton* and wife v. *Pool*, (*c*) the plaintiff declared, that his wife's father being seized of certain lands, now descended to the defendant, and being about to cut down 1000l. worth of timber off from the said lands to raise a portion for his daughter, the defendant, being his heir, promised the father, in consideration that he would forbear to fell the timber, that he would pay the daughter 1000l. After verdict for the plaintiff, upon *non assumpsit*, it was moved in arrest of judgment, that the action ought not to have been brought by the daughter, but by the father, or if the father were dead, by his executors, for the promise was made to the father, and the daughter was neither privy nor interested in the consideration, nothing being due to her: but *Scroggs*, Ch. J. said, that there was such apparent consideration of affection from the father to his children, for whom nature obliged him to provide, that the consideration and promise to the father might well extend to the children. Judgment for the plaintiff; for the son had the benefit by having the wood, and the daughter had lost her protion by these means.

But, in general, it is necessary that the consideration on which the promise is founded should move from the party in whose favour the promise is made.

Thus, in the case of *Bourne* v. *Mason*, (*d*) where the plaintiff declared, that A. being indebted to the plaintiff and defendant in two several sums of money, and B. being indebted to A. in another sum, and there being a communication between the parties, the defendant, in consideration that A. would permit the defendant to sue B. in A.'s name for the recovery of the sum due from B. to A. promised that he, the defendant, would pay A.'s debt to the plaintiff, and alleged that A. permitted the de-

(*b*) 1 Rol. Abr. 27. l. 40. 31. l. 5.
(*c*) 2 Lev. 210. 1 Vent. 318. 332. T. Raym. 302. S. C.
(*d*) 1 Vent. 6.

fendant

fendant to ſue accordingly, and that he recovered: after verdict for the plaintiff, upon *non aſſumpſit*, it was moved in arreſt of judgment, that the plaintiff could not maintain this action: and of this opinion were the court, obſerving, that the plaintiff was a mere ſtranger to the conſideration, having done nothing of trouble to himſelf, or of benefit to the defendant.

So, in the caſe of *Crow* v. *Rogers*, (*e*) where the plaintiff declared, that J. S. was indebted to the plaintiff, and it was agreed between J. S. and the defendant, that the defendant ſhould pay to the plaintiff the debt due to him from J. S., and that J. S. ſhould make the defendant a title to a houſe, in conſideration whereof the defendant promiſed to pay to the plaintiff the debt due to him from J. S., and then averred that J. S. was always ready to perform his part of the agreement: on demurrer, judgment was given for the defendant, becauſe the plaintiff was a ſtranger to the conſideration.

Of a Conſideration which the Party cannot perform.

The conſideration muſt be ſuch as the party to whom a promiſe is made, has a power by law to perform or cauſe to be performed.

Thus, in the caſe of *Harvey* v. *Gibbons*, (*f*) the plaintiff declared, that he being bailiff to J. S., the defendant in conſideration that the plaintiff would diſcharge defendant of a debt due to J. S., promiſed, &c. After verdict and judgment for the plaintiff in the court below, it was reverſed in B. R. becauſe the plaintiff could not diſcharge a debt due to his maſter.

The principle eſtabliſhed by the preceding caſe, was recognized by Lord *Kenyon*, Ch. J. in the caſe of *Nerot* v. *Wallace*, (*g*), where the conſideration was, that the plaintiffs, who were aſſignees under a commiſſion of bankrupt againſt J. S. would forbear to proceed to have the examination of J. S. taken before the commiſſioners concerning certain ſums, with which J. S. was charged, and that the commiſſioners would forbear, and deſiſt accordingly. Lord *Kenyon* ſaid, "The ground on which I found my judgment is this;

(*e*) Stra. 592. See alſo 1 Vin. Abr. 333. to 337. 1 Boſ. and Pul. 101. n. c. 3 Boſ and Pul. 149 n. a.
(*f*) 2 Lev. 161. (*g*) 3 Term Rep. 22.

that

that every perſon, who in conſideration of ſome advantage, either to himſelf or another, promiſes a benefit, muſt have the power of conferring that benefit up to the extent to which that benefit profeſſes to go; and that not only in fact, but law." Now the promiſe made by the aſſignees in this caſe, which was the conſideration of the defendant's promiſe, was not in their power to perform; becauſe the commiſſioners had nevertheleſs a right to examine the bankrupt. And no colluſion of the aſſignees could deprive the creditors of the right of examination, which the commiſſioners would procure them. The aſſignees ſtipulated, not only for their own acts, but alſo that the commiſſioners ſhould forbear to examine the bankrupt: but clearly they had no right to tie up the hands of the commiſſioners by any ſuch agreement. And if any propoſal of that ſort had been made to the commiſſioners, they, as acting in a public duty, would have been guilty of a breach of that duty in acceding to it.

CHAPTER

CHAPTER III.

Of Illegal Contracts.

ALL contracts or agreements which have for their object any thing which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void: For *ex turpi contractu actio non oritur*, is a rule both in law and equity. (*a*) And whenever a contract or agreement is entered into with a view to contravene any of these general principles, there is no form of words, however artfully introduced or omitted, which can prevent courts of law and equity from investigating the truth of the transaction.

Thus, in an action upon a bond (*b*) given for compounding a prosecution for perjury, it was argued, in support of the action, that no averment could be admitted of the bond having been given for such a consideration, because it did not appear in the condition. But to this it was answered by Lord Ch. J. *Wilmot*, "that "the manner of the transaction was to gild over and conceal the "truth; and whenever courts of law see such attempts made to "conceal such wicked deeds, they will brush away the cobweb "varnish, and show the transactions in their true light. This "is an agreement to stifle a prosecution for wilful and corrupt "perjury, a crime most detrimental to the commonwealth; for "it is the duty of every man to prosecute, appear against, and "bring offenders of this sort to justice. This is a contract to "tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and "the reason why the common law says such contracts are void, is "for the public good. *You shall not stipulate for iniquity.* All

(*a*) See Fonbl. Treat. of Equity. 1.V. Bk. 1. c. 4. s. 4. n. y.
(*b*) *Collins* v. *Blantern*, 2 Wils. 341. 347. See also 1 P. Wms. 156. 220.

"writers

" writers upon our law agree in this, no polluted hand ſhall touch " the pure fountains of juſtice."

But, a contract or agreement muſt be unlawful at the time of making it, otherwiſe it cannot be ſet aſide; for, it is ſaid, (*c*) the law knows of no contract but what was *good or bad at the time of the contract made*; it cannot be one or other, according to a ſubſequent contingency.

In this chapter it will only be neceſſary to take a general view firſt, of contracts and agreements which are void by the common law; and ſecondly, of thoſe which are prohibited by ſtatute.

In conſidering theſe which come under the firſt claſs, it is hardly neceſſary to ſtate that every contract or agreement which has for its object any thing forbidden by the law of God: as to commit murder, theft, perjury, or the like, is void by the common law. Therefore if a man is under an obligation to pay to another 20*l.* if he will kill or rob ſuch a perſon; this is a void obligation, and creates no right. (*d*)

The common law alſo prohibits every thing which is unjuſt, or *contra bonos mores*. Therefore a contract or agreement which is made in contravention of theſe general principles is void: for inſtance, if A. promiſe in conſideration of 20*s.* paid to him by B. he will pay B. 40*s.* if he does not beat J. S. out of ſuch a cloſe: this is illegal and void. (*e*)

So, if A. requeſt B. to beat another, and promiſe to ſave him harmleſs; this is a void conſideration, for the act is unlawful. (*f*)

But, it is ſaid, (*g*) if I requeſt another to enter into B.'s land, and in my name to drive out the beaſts, and impound them, and promiſe to ſave him harmleſs, this is a good *aſſumpſit*, though the act is tortious.

Future Cohabitation, &c.] Contracts entered into with a view to future cohabitation and proſtitution are illegal and void, as being againſt

(*c*) Per *Cur.* 10 Mod. 67. See alſo Bul. N. P. 146.
(*d*) Fitzh. Abr. tit. Obligation 13. (*e*) 2 Lev. 174.
(*f*) Hutt. 56. (*g*) *Per Hobart*, in the caſe of *Hutton* and *Winch*, Win. 49.

public

public morality. (*h*) But an engagement merely by way of reparation for *paſt* ſeduction and cohabitation is valid; for this is no more than what a man ought, in honor and conſcience, to do. (*i*)

So, a contract for the uſe and occupation of lodgings which are let expreſsly for the purpoſes of proſtitution, is void. (*k*)

But an agreement to pay for the waſhing and getting up of expenſive articles of dreſs for a proſtitute is valid, though it be known to the party by whom the work is done, that the dreſſes are to enable her to appear at public places, &c. (*l*)

A contract for the ſale of prints of an immoral and libellous tendency has alſo been holden to be illegal and void. (*m*)

So, all contracts and agreements which have for their object any thing contrary to principles of *ſound policy* are void by the common law. (*n*)

Reſtraint of Trade.] Under this deſcription may be ranked contracts which bind any to a total reſtraint of trade; for all ſuch obligations are contrary to principles of *national* policy; one great object of which is to encourage and promote trade. Therefore it has been holden, that a promiſe or obligation which binds any to a *total* reſtraint of trade, whether for a limited time, or generally, is unlawful and void. (*o*) But, if a man for a good conſideration reſtrains himſelf from the exerciſe of his trade in a particular place, this is lawful: for the policy of the nation is not concerned in what place a man exerciſes his calling. And there may happen inſtances wherein ſuch a contract may be uſeful and beneficial; as to prevent a town from being over-ſtocked with any particular trade: Or, in the caſe of an old man, who, perceiving himſelf under ſuch circumſtances of body or mind, as that he is likely to be a loſer by continuing his trade, will find it better to part with it for a conſideration; that, by ſelling his

(*h*) *Walker* v. *Perkins*, 3 Burr. 1568. See alſo 2 Veſ. 160. 5 Veſ. jun. 293.

(*i*) *Armandale* v. *Harris*, 2 P. Wms. 432. *Cray* v. *Rooke*, Forreſt. 153. *Turner* v. *Vaughan*, 2 Wilſ. 339.

(*k*) 1 Eſp. Rep. 13. Ni. Pri. Abr. 59, 60. *Et vide poſt*, Part III. tit. Uſe and Occupation. (*l*) 1 Boſ. and Pul 340.

(*m*) Per *Lawrence* Juſt. *in Fores* v. *Johnes*, 4 Eſp. Rep. 97. *vide poſt*, Part III. tit. Goods ſold, &c. (*n*) Cowp. 39.

(*o*) Vide *Mitchel* v. *Reynolds*, 1 P. Wms. 181. *Et poſt*, Part III. tit. Contracts in Reſtraint of Trade.

cuſtom,

cuſtom, he may procure to himſelf a livelihood which he might probably have loſt by trading longer. (*p*)

Reſtraint of Marriage.] Upon the ſame principle of *public policy*, the common law makes void all contracts and agreements which totally reſtrain a perſon from marrying; or from marrying any body except a particular perſon, without impoſing an obligation to marry that particular perſon: Thus, where A. promiſed B. that he would not marry with any perſon beſides herſelf; if he did, he agreed to pay her 1000*l.* In an action (*q*) of covenant upon this contract, the Court of *King's Bench* held, that this was an agreement in reſtraint of marriage; for it was not a covenant to marry the plaintiff; but not to marry any one elſe: and yet ſhe was under no obligation to marry him; ſo that it reſtrained him from marrying at all, in caſe ſhe had choſen not to permit him to marry her.

Marriage brocage Contracts.] So alſo, all *marriage brocage contracts* are void. (*r*) Theſe contracts are ſo called from the circumſtance of their promiſing a reward to a perſon if, by reaſon of the influence which he may poſſeſs over one of the parties to the match, which is ſought to be accompliſhed, he can procure a marriage between them. They are alſo conſidered to be of a very pernicious tendency, by being the occaſion of many unhappy marriages.

Simoniacal Contracts.] So, all *ſimoniacal contracts* are void: Thus, where the conſideration of the contract was, that the plaintiff would procure the defendant to be preſented and inſtituted to a chapel, which was a donative in the king's gift; it was adjudged illegal, on the ground of its being ſimony, and therefore incapable of ſupporting an *aſſumpſit*. (*s*)

(*p*) Vide *Mitchel* v. *Reynolds*, 1 P. Wms. 191. *Et poſt*, Part III. tit. Contracts in Reſtraint of Trade.

(*q*) *Lowe* v. *Peers*, 4 Bur. 2225. See alſo 2 Vern. 102. 215. 2 Eq. Ca. Abr. 248. 1 Atk 287. 2 Atk 538. 542. 10 Veſ jun. 429.

(*r*) See *Arundel* v. *Trevillian*, 1 Ch. Rep 47. *Hall* v. *Potter*, 3 Lev. 411. Show. P. C. 76. 4 Bro. P. C. 144 8vo ed.

(*s*) Cro. Car. 337. 353. 361. 1 Roll. Abr. 18. l. 5. See alſo the caſe of *Fytche* v. *Biſhop of London*, Cunningham's Law of Simony, 52. 4 Term Rep. 359.

Maintenance of Suits] So, all contracts and agreements *for the maintenance of suits*, are illegal and void. (*t*) Maintenance is an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. It is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. A man may, however, maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. And any agreement made in respect of such maintenance is valid. (*u*)

Contracts made to prevent the due course of justice, &c.] So, every *agreement or promise which is made with a view to prevent the due course of justice* is illegal: As, if A. promise B. money in consideration that he will not give evidence in a cause; such promise cannot be enforced; it being unlawful and iniquitous for any man to suppress testimony in any cause. (*v*)

So, a promise made by the friend of a bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received, and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, is void, as being against the policy of the bankrupt laws. For the intention of the legislature was that the creditors should have the full examination of the bankrupt, as to the state of his effects and the disposition of them; whereas the promise in this case would be to induce the assignees and commissioners to forbear doing their duty. (*w*)

But a covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further under the commission is lawful. (*x*)

Contracts with Sheriffs, &c.] So, if a sheriff for 10*l.* promise that a prisoner shall escape, this promise is unlawful and void. (*y*)

(*t*) See 1 Leon. 179 Dy 355. b. (*u*) See 1 Hawk P. C. cap. 83.
(*v*) 1 Leon. 180 (*w*) *Nerot* v. *Wallace*, 3 Term Rep. 17.
(*x*) *Kaye* v. *Bolton* 6 Term Rep. 134.
(*y*) 10 Co. 102. Cro. El 199.

So,

So, where A. is in execution at the ſuit of B.; and C., in conſideration that the gaoler will permit A. to go at large, aſſumes and promiſes to him that A. ſhall pay the debt at a certain day, and that he the ſaid C. will ſave the gaoler harmleſs; this promiſe is void, becauſe the conſideration is againſt law. (*z*)

So alſo, a promiſe to a bailiff to give him a ſum of money to accept bail, is void; it being the duty of the ſheriff to take good and ſufficient bail when tendered to him. (*a*)

So, if A. obtains a judgment againſt B., and thereupon takes out an *elegit*, and delivers it to the under-ſheriff, who by virtue thereof ſeizes certain goods of B., and afterwards the under-ſheriff, in conſideration that A. will take out a new *elegit*, and deliver it to him, promiſes to cauſe and procure the ſaid goods to be found by inquiſition, and to deliver the ſame to ſuch perſon as A. ſhall appoint, &c.; this promiſe is againſt law, being to do a thing againſt the duty of his place, by which he is bound to return an indifferent and equal jury between the parties; and though part of the promiſe was to do a lawful act, yet that depending upon the other part, which was illegal, makes the whole void. (*b*)

But a contract to indemnify a ſheriff in the doing of a lawful act is good.

Thus, where a plaintiff, in an action, pointed out particular goods, and deſired the ſheriff to take them under a *fieri facias*; and in conſideration that the ſheriff would take them, the plaintiff promiſed to imdemnify him; this was held a valid promiſe; for the plaintiff having pointed out the goods, and required the ſheriff to take them in execution, it was reaſonable that he ſhould ſave the ſheriff harmleſs. (*c*)

So, where A. was arreſted, and C., in conſideration that the bailiff would ſuffer A. to continue in the houſe of C. till the next morning, promiſed that he would then deliver A. in ſafe cuſtody to the

(*z*) Yelv. 197. 2 Bulſt. 213.
(*a*) *Smith* v *Stoteſbury*, 2 Bur. 924. 1 Bl. Rep 204. S. C.
(*b*) T. Jones 74. Cart 223.
(*c*) Cro Jac 652. See alſo 1 Ld. Raym 279.

bailiff; this was held to be a lawful conſideration; for it ſhall not be intended that the bailiff was ever abſent from B., ſo that it could be no eſcape. (*d*)

Trading with the Enemy.] *All trading with the ſubjects of an enemy's country, without the king's licenſe, is illegal.* Therefore a policy of inſurance on enemy's property is void. (*e*)

It is alſo illegal for a ſubject in time of war, without the king's licenſe, to bring, even in a neutral ſhip, goods from an enemy's port, which were purchaſed by his agent reſident in the enemy's country, after the commencement of hoſtilities; although it may not appear that they were purchaſed of an enemy. (*f*)

But, a neutral ſubject reſiding in the enemy's country, and carrying on trade there in partnerſhip with an alien enemy, may inſure his intereſt in the joint property. (*g*)

Wagers.] All *wagers* which have a tendency to incite a breach of the peace, or which are contrary to principles of ſound policy or morality, are illegal, and void by the common law: as, if a wager be laid on the event of a battle; (*h*) or upon the ſex of a perſon; (*i*) or upon the event of war or peace; (*k*) or of an election of members to ſerve in parliament; (*l*) or reſpecting the produce of any branch of the revenue; (*m*) theſe are unlawful and void.

So, if a wager is made merely as a colour to diſguiſe an illegal tranſaction, as ſimony, bribery, uſury, or the like, they are equally void. (*n*)

But, in general, a wager may be conſidered as legal if the ſubject of it has no immediate tendency to a breach of the peace, or

(*d*) 1 Sid. 132. 1 Keb. 483. 1 Lev. 98.
(*e*) 8 Term Rep. 548. 6 Term Rep. 23. 4 Eaſt. 402. 417. But ſee Salk 46. Ld. Raym 282. Bac. Abr. tit. Alien. D. as to the diſtinction between alien friend and alien enemy, &c.
(*f*) *Potts* v. *Bell*, 8 Term Rep. 548. (*g*) 6 Term Rep. 413.
(*h*) 5 Term Rep. 405. (*i*) Cowp. 729.
(*k*) 1 Term Rep. 57. n. b. (*l*) 1 Term Rep. 56.
(*m*) 2 Term Rep. 616. 2 Bos. and Pul. 130. (*n*) Cowp. 39.

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to affect the feelings or intereſt of a third perſon; and is not contrary to the principles of morality or ſound policy. (*o*)

Fraudulent Contracts.] *Contracts which are infected with fraud are void both at law and in equity:* for the baſis of all dealings ought to be good faith.

Therefore, where two ſutlers (*p*) to ſeveral regiments of militia (who as ſuch were entitled to certain forage of oats and hay for divers horſes daily out of the king's magazine belonging to the camp) entered into an agreement with the perſon who furniſhed and ſupplied the magazine, that the ſutlers would abſtain from taking the forage, or ſuch part thereof as they ſhould think fit, and would leave the ſame to be the property of the perſon ſupplying them, and that he ſhould pay and allow them 9½*d.* by the ration, for every ration to which they ſhould be entitled, and which they ſhould ſo leave at the magazine: this was held to be a corrupt agreement between the parties, as having for its object the cheating of government, by taking a compoſition for the forage of the whole number of horſes allowed, whether they were kept or not, which was a clear fraud upon the public.

So, where goods are put up to ſale by public auction, under the uſual conditions, *viz.* "that the higheſt bidder ſhall be the pur-"chaſer," if the owner, or any third perſon on his behalf, *ſecretly* attend the ſale and bid for the goods, in order to enhance the price, it is a fraud upon the real bidders; and the ſale is therefore void. (*q*)

So, if A. agree to purchaſe goods of B. at a certain ſum for the benefit of C.; any ſecret agreement between B. and C. that the latter ſhall pay a further ſum for them is void, as a fraud on A.; and C. is not liable to pay ſuch further ſum. (*r*)

(*o*) *Vide* the caſes on this ſubject *poſt*, Part III. tit. Wagers and Money had and received upon illegal Wagers.

(*p*) *Willis* and another v. *Baldwin*, Doug. 450.

(*q*) *Bexwell* v. *Chriſtie*, Cowp. 395. *Howard* v. *Caſtle*, 6 Term Rep. 642. S. P. But ſee 1 Fonbl. Treat. of Eq. 1 Ed. c. 4. ſ. 4. n. x. *Chriſtie* v. the Attorney General. 6 Bro. P. C. 520. 3 Ves. jr. 620-7.

(*r*) *Jackſon* v. *Duckſire*, 3 Term Rep. 551.

So, an agreement to pay so much in the pound for recommending customers to purchase goods, is said (*s*) to be illegal; such engagements having a tendency to enhance the price of the goods; and consequently a species of fraud upon third persons.

So, if all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made; the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, and therefore will not support an action. (*t*)

Fraudulent Representation and Concealment of material Circumstances.] The only remaining circumstance which need be noticed in this general view of the subject is the *fraudulent representation, or concealment of material circumstances, which, it is said,* (*u*) *vitiates all contracts.* For it is a rule, that each of the contracting parties is bound to disclose faithfully to the other all material circumstances within his knowledge respecting the subject matter of the contract; and if this be omitted either from design, neglect, or accident, the contract is void.

With respect, however, to concealment, it is apprehended that the rule only applies to cases of concealment of material circumstances which are *exclusively* within the knowledge of *one* of the contracting parties; and does not extend to cases of sales, where both parties inspect the commodity bargained for, and each exercises his own judgment as to the quality and value, &c. and where no deceit is practised by either party. (*v*)

(*s*) *Per* Lord *Ellenborough*. *Wyburd* v *Stanton*, 4 Esp. Rep. 179.

(*t*) *Cockshott* v *Bennett*, 2 Term Rep. 763. *Jackson* v *Lomas*, 4 Term Rep. 166. *Leicester* v. *Rose*, 4 East. 372. S. P.

(*u*) Per *Yates*, Just. 2 Bl. Rep. 465. See also 2 P. Wms. 170. Doug. 260. 1 Term Rep. 12. Skin. 327.

(*v*) Vide 2 Bl. Com. 451. 3 Bl. Com. 166. *Et vide post*, Part III. tit. Warranty. See also Sugden's Law of Vendors, 1 *ed.* 19.

Having

Having now ſhown what contracts and agreements are void at the common law, I ſhall proceed to point out thoſe which are made void by ſtatute.

It is ſaid (*w*) that every contract made for or about any matter or thing which is prohibited and made unlawful by any ſtatute, is a void contract, though the ſtatute itſelf doth not mention that it ſhall be ſo, but only inflicts a penalty on the offender; becauſe a penalty implies a prohibition, though there are no prohibitory words in the ſtatute.

So, a contract which is declared by a particular ſtatute to be illegal, is not made good by a repeal of that ſtatute after the contract has been executed. (*x*)

Sale of Offices, &c.] By the ſtatutes 12 R. 2. c. 2. and 5 and 6 Ed. 6. c. 16. *the ſale of certain public offices*, and the *deputations thereof*, are prohibited; and, by the latter ſtatute, it is enacted that all agreements, covenants, bonds, or aſſurance for any of the ſaid offices, or the deputation thereof, ſhall be void. (*y*)

By the ſtat. 23 Hen. 6. c. 9. the ſheriff is directed to let out of priſon all perſons by them arreſted on meſne proceſs, or by cauſe of indictment of treſpaſs, upon reaſonable ſureties of ſufficient perſons. And it is enacted, "that no ſheriff ſhall take any "obligation for any cauſe therein directed, but only to themſelves, "of any perſon, nor by any perſon which ſhall be in their ward "by the courſe of the law, but by the name of their office, and "upon condition written, that the ſaid priſoners ſhall appear at "the day contained in the writ, bill, or warrant, and in ſuch places "as the ſaid writs, bills, or warrants, ſhall require. And that if "any of the ſaid ſheriffs, or other officers or miniſters, take any "obligation in other form, by colour of their offices, it ſhall be "void."

(*w*) *Per Holt.* Ch. J. Carth. 252. (*x*) 1 H. Bl. 65.
(*y*) For the caſes upon this ſubject, *vide poſt*, Part III. tit. *Contracts reſpecting the Sale of Offices, Contracts with Sheriffs, &c.*

Upon this ſtatute it has been holden, that if a ſheriff let a priſoner, who is not bailable, go at large upon his ſingle bond; ſuch obligation is void. (z)

This ſtatute alſo extends to *promiſes*, as well as to *obligations*; and accordingly it has been holden, (a) that an agreement in writing to put in good bail for a perſon arreſted on meſne proceſs, at the return of the writ, or ſurrender the body, or pay debt and coſts, made by a third perſon with the bailiff of a ſheriff, in conſideration of his diſcharging the party arreſted, was void by the ſtatute of Hen. 6.; for, ſince the paſſing of that ſtatute, the uſage has been to take the ſecurity by bond; and that bond, by the words of the ſtatute, muſt be entered into to the ſheriff, or to ſuch officer as has the return of proceſs; whereas here was no bond, but a mere ſimple contract, and that with the ſheriff's officer; and farther the bond muſt be given only for the appearance of the party, and for no other purpoſe.

Uſury.] By 12 Ann. ſt. 2. c. 16. to prevent *uſury*, it is enacted, "that no perſon or perſons whatſoever, upon any contract, "ſhall take directly, or indirectly, for loan of any monies, wares, "merchandize, or other commodities whatſoever, above the value "of 5*l.* for the forbearance of 100*l* for a year, and ſo after that "rate for a greater or leſſer ſum, or for a longer or ſhorter time; "and that all bonds, contracts, and aſſurances whatſoever, made "for payment of any principal, or money to be lent or covenanted "to be performed upon or for any uſury, whereupon, or whereby "there ſhall be reſerved or taken above the rate of 5*l.* in the hun-"dred, as aforeſaid ſhall be utterly void."

Theſe reſtrictions, however, do not apply to contracts made in foreign countries; for on ſuch contracts, our courts will direct the payment of intereſt according to the law of the country in which ſuch contract was made. (b) Thus, *Iriſh*, *American*, *Turkiſh*, and *Indian* intereſt have been allowed in our courts to the amount of even 12*l. per cent.* For the moderation or exorbitance

(z) 10 Co. 100. b.
(a) *Rogers* v. *Rives*, 1 Term Rep. 418.
(b) 1 P. Wms. 395. See alſo Fonbl. Treat. of Eq. 1 bk. c. 4. f. 7. n. g

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of intereſt depends upon local circumſtances, and the refuſal to enforce ſuch contracts would put a ſtop to all foreign trade. (*c*)

Every ſecurity given upon an uſurious conſideration is ſo contaminated by it, that the ſtatute of uſury makes the ſecurity abſolutely null and void; ſo that it cannot be enforced by law by any perſon, however innocent. Therefore, it has been held, (*d*) that a bill of exchange, or a promiſſory note, given upon an uſurious conſideration, is void, even in the hands of an indorſee for a valuable conſideration without notice of the uſury.

But if a bill of exchange has been given for a *bona fide* conſideration, uſury in any of the intermediate indorſements, ſhall not avoid it in the hands of a *bona fide* indorſee, in an action againſt the acceptor. (*e*)

Gaming.] *Gaming* is alſo prohibited by ſtatute, though at common law, the playing at cards, dice, &c. ~~when practiſed innocently, and as a recreation,~~ is lawful if it be not within the reſtriction of any ſtatute. (*f*) But as the practice was found to encourage idleneſs and other vices, the ſtatute 33 Hen. 8. c. 9, reſtrained it among the inferior ſort of people. Gentlemen were, however, ſtill left free to purſue it, until the 16 Car. 2. c. 7. by which it is enacted, that "if any perſon, by playing or betting, ſhall loſe more than 100*l.* at one time, he ſhall not be compellable to pay his loſs, and the winner, ſhall forfeit treble the value; one moiety to the king, the other to the informer." This proviſion of the legiſlature was, however, ſoon found to be inſufficient to its purpoſe: it was therefore enacted, by the ſtat. 9 Anne, c. 14. "that all bonds, and other ſecurities, given for money won at "play, or money lent at the time to play with, ſhould be utterly "void; that all mortgages or incumbrances of lands, made upon "the ſame conſideration, ſhould be and enure to the uſe of the "mortgagor, and that if any perſon at one time loſe 10*l.* at play, "he may, within three months, ſue the winner, and recover it "back by action of debt at law: and in caſe the loſer does not,

(*c*) See *Stapleton* v. *Conway*, 3 Atk. 727. Fonbl. Treat. of Eq. bk. 5. c. 1. ſ. 6.

(*d*) *Lowe* v *Waller*, Doug. 736. See alſo 1 Saund. 295. n. 1.

(*e*) *Daniel* v *Cartony*, 1 Eſp. Rep. 274. See alſo *Parr* v *Eliaſon*, 1 Eaſt, 92. S. P. (*f*) 2 Vent. 175. *Dailing* v. *Froſt*, 1 Eſp. Rep. 235.

"within

" within the time limited, ſue and proſecute, any other perſon " may ſue the winner for treble the ſum ſo loſt; and the winner " is obliged and compellable to anſwer upon oath any bill or bills " filed againſt him for diſcovering the ſum or ſums of money, or " other thing, ſo won by him at play."

Subſequent ſtatutes have ſuperadded further penalties to reſtrain this faſhionable vice; " which,' Sir *William Blackſtone* obſerves, (*g*) " may ſhew that our laws againſt gaming are not ſo deficient as " ourſelves and our magiſtrates in putting theſe laws in execu- " tion."

It is obſervable, that the ſtat. 16 Car. 2. declares, that the contract for money loſt at play, and all ſecurities given for it, ſhall be utterly void; but the ſtat. 9. Anne, confines itſelf to the *ſecurities* for money won or lent at play. Upon which it has been determined, that though both the ſecurity and the contract are void as to money won at play, only the ſecurity is void as to money lent at play; and that the contract remains, and the lender may maintain his action for it. (*h*)

Theſe acts having declared the ſecurity void, it may be obſerved, that a bill of exchange given for money won at play, cannot be recovered upon, though in the hands of an indorſee for a valuable conſideration, and who is totally ignorant of the circumſtance affecting the ſecurity. (*i*)

Stock-jobbing.] So, in order to *prevent the pernicious and deſtructive practice of ſtock-jobbing*, it is enacted by the 7 Geo. 2. c. 8. (made perpetual by 10 Geo. 2. c. 8.) " That all contracts and " agreements whatſoever which ſhall be made or entered into by " or between any perſon or perſons whatſoever upon which any " premium or conſideration in the nature of a premium ſhall be " given or paid for liberty, to put upon, or deliver, receive, accept, " or refuſe any public or joint ſtock, or other public ſecurities " whatſoever, or any part, ſhare, or intereſt therein, and alſo all " wagers, and contracts in the nature of wagers, and all contracts

(*g*) 4 Bl. Com. 173.

(*h*) *Vice Robinſon* v. *Bland*, 2 Burr. 1080. *Barjeau* v. *Wahnſley*, 2 Stra. 1249 *Hyley* v. *Jacob*, Com. Rep. 4.

(*i*) *Bowyer* v. *Bampton*, 2 Stra. 1155. *Lowe* v. *Walker*, Doug. 736.

" in

" in the nature of putts and refuſals, relating to the then preſent " or future price or value of any ſuch ſtock or ſecurities, as afore- " ſaid, ſhall be null and void to all intents and purpoſes whatſo- " ever, and all premiums, ſum or ſums of money whatſoever, " which ſhall be given, received, paid, or delivered, upon all ſuch " contracts or agreements, or upon any ſuch wagers or contracts, " in the nature of wagers, as aforeſaid, ſhall be reſtored and re- " paid to the perſon or perſons, who ſhall give, pay, or deliver " the ſame, who ſhall be at liberty, within ſix months from and " after the making ſuch contract or agreement, or laying any ſuch " wager, to ſue for, and recover the ſame from the perſon or per- " ſons to whom the ſame is, or ſhall be paid, or delivered, with " double coſts of ſuit, by action of debt founded on this act, to " be proſecuted in any of his majeſty's courts of record, in which " action no eſſoin, protection, wager of law, or more than one " imparlance ſhall be allowed; and it ſhall be ſufficient therein " for the plaintiff to alledge that the defendant is indebted to the " plaintiff, or has received to the plaintiff's uſe, the money or pre- " mium ſo paid or received, whereby the plaintiff's action accrued " to him, according to the form of this ſtatute, without ſetting forth " the ſpecial matter."

Upon this ſtatute it has been determined (*k*) that where A. being employed as a broker for B. in ſtock-jobbing tranſactions, paid the differences for him; a diſpute ariſing between them, reſpecting the amount of A.'s demand, the matter was referred to C. who awarded 603*l.* to be due: on which A. drew on B. for 100*l.* part of the above, and indorſed the bill to C. after B. had accepted it; held that C. could not recover on the bill.

So, if a broker draw on his employer for differences paid for him in ſtock-jobbing tranſactions. and the employer accept the bill, and then the broker indorſe it to a third perſon after it is due, the latter cannot recover on the bill. (*l*)

Lottery.] All contracts or agreements for *the ſale of any tickets*, or *ſhares of tickets*, or *chances*, in any private lottery; or, for the ſale of any chances of tickets in any public lottery; and all *in-*

(*k*) *Steers* v. *Lashley*, 6 Term Rep. 61.
(*l*) *Brown* v. *Turner*, 7 Term Rep. 630.

ſurances

ſurances of numbers in any lottery, except by the holders of tickets in the public lottery, are prohibited by various ſtatutes. (*m*)

Wager Policies, &c.] And, in order to prevent another ſpecies of *gaming, called wager policies, or inſurances of intereſt or no intereſt*, the ſtat. 19 Geo. 2. c. 37. ſ. 1. enacts, "that no aſſurance "ſhall be made by any perſon or perſons, on any ſhip or ſhips be- "longing to his majeſty, or any of his ſubjects, or on any goods, "merchandizes, or effects laden or to be laden on board of any "ſhip or ſhips, *intereſt or no intereſt, or, without further proof, or "intereſt than the policy*, or, by way of gaming or wagering, or, "*without benefit of ſalvage to the inſurer*; and that every ſuch in- "ſurance ſhall be void to all intents and purpoſes." (*n*)

And, by the fourth ſection of this act, which was made to prevent *all re-aſſurances*, it is enacted, "that it ſhall not be lawful "to make re-aſſurance, unleſs the aſſurer ſhall be inſolvent, be- "come a bankrupt or die; in either of which caſes, ſuch aſſurer "his executors, adminiſtrators, or aſſigns, may make re-aſſurance "to the amount of the ſum before by him aſſured; provided it "ſhall be expreſſed in the policy to be a re-aſſurance." (*o*)

By the ſtat. 6 Geo. 1. c. 18. ſ. 12. it is enacted, that all policies of inſurance upon ſhips at ſea, made by any corporation (other than the two corporations therein mentioned) or by perſons acting in partnerſhip, ſhall be void. (*p*)

So, all inſurances upon *prohibited goods*, or relating to *contraband trading*, are void by the ſtatutes 9 & 10 W. & M. c. 44. and 33 Geo. 3. c. 52. (*q*)

Smuggling.] So, *all contracts made in contravention of the revenue laws of this country* are void. Thus, where an agreement was made between two parties, (*r*) ſubjects of this country, for the

(*m*) *Vide* 5 Geo. 1. c. 9. ſ. 41. 8 Geo. 1. c. 2. ſ. 36. 6 Geo. 2. c. 35. ſ. 29. 12 Geo. 2. c. 28. 22 Geo. 3. c. 47. 42 Geo. 3. c. 119. ſ. 5. See alſo *Dey* v. *Shee*, 2 Term Rep. 617.

(*n*) For the caſes upon this ſtat. *vide Park* on Inſurance, chap. 14.

(*o*) *Vide Park* on Inſurance, chap. 15. (*p*) Ibid. chap. 1.

(*q*) Ibid. chap. 12. 13. (*r*) *Biggs* v. *Lawrence*, 3 Term Rep. 454. *Vide poſt*, Part III. tit. Goods ſold, &c.

ſale

ſale and delivery of goods in *Guernſey*, for the purpoſe of being ſmuggled into *England*; it was holden, that the vendor could not maintain an action for the value of the goods. And in a ſubſequent caſe, (*s*) it was decided, that the circumſtance of the vendor being an inhabitant of *Guernſey* would not alter the caſe, for he was ſtill a ſubject of this country.

Treating Voters at Elections.] By the ſtatute 7 and 8 W. 3. c. 4. (which was made to *prevent all ſpecies of bribery and corruption at elections for members of parliament*) it is enacted, "that no perſon "after the teſte of the writ to the ſheriff, ſhall before his elec- "tion directly or indirectly, give, preſent, or allow to any perſon "or perſons having voice or vote in ſuch election, any money, "meat, drink, entertainment, or proviſion, or make any preſent, "gift, reward, or entertainment, or ſhall at any time hereafter, "make any promiſe, agreement, obligation, or engagement, to "give or allow any money, meat, drink, proviſion, preſent, re- "ward, or entertainment, to or for any ſuch perſon or perſons "in particular, or to any ſuch county, city, &c. or to or for the "uſe, &c. of any ſuch perſon, *in order* to be elected, or for being "elected to ſerve in parliament for ſuch county, city, &c."

Upon this ſtatute it has been holden, (*t*) that an inn-keeper furniſhing proviſions for voters, at the requeſt of a candidate, after the teſte of the writ, cannot recover the expences of ſuch proviſions againſt the candidate.

Agreement to ſign a Bankrupt's Certificate.] *All agreements by a bankrupt with a creditor to pay money, &c. for ſigning his certificate, are declared void* by the ſtat. 5 Geo. 2. c. 30. ſ. 11. which enacts, "that every bill, note, contract, agreement, or other ſecurity "whatſoever, to be made or given by any bankrupt, or by any "other perſon, unto or to the uſe of or in truſt for any creditor "or creditors, or for the ſecurity of the payment of any debt or "ſum of money due from ſuch bankrupt at the time of his be- "coming bankrupt, or any part thereof, between the time of his "becoming bankrupt, and ſuch bankrupt's diſcharge, as a conſi-

(*s*) *Clugas* v. *Penaluna*, 4 Term Rep. 466.
(*t*) *Ribbans* v. *Crickett*, 1 Bos. and Pul. 264. See alſo the Bribery Act, 2 Geo. 2. c. 24.

"deration,

" deration, or to the intent, to perſuade him, her, or them to " conſent to or ſign any ſuch allowance or certificate, ſhall be " wholly void and of no effect; and the monies thereby ſecured, " or agreed to be paid ſhall not be recovered or recoverable." (*u*)

Sale of Liquors, &c.] By the ſtatute 24 Geo 2. c. 40. ſ. 12. (which was made for the purpoſe of preventing the *pernicious effects of dram drinking and ſelling liquors in ſmall quantities*,) it is enacted, " that no perſon or perſons whatſoever ſhall be entitled unto, or " maintain any cauſe, action, or ſuit for, or recover either in law " or equity, any ſum or ſums of money, debt, or demands what- " ſoever, for or on account of any ſpirituous liquors, unleſs ſuch " debt ſhall have really been and *bonâ fide* contracted at one time, " to the amount of 20*s.* or upwards; nor ſhall any particular ar- " ticle, or item in any account or demand for diſtilled ſpirituous " liquors, be allowed or maintained, where the liquors delivered " at one time, and mentioned in ſuch article or item, ſhall not " amount to the full value of 20*s.* at the leaſt, and that without " fraud or covin."

But this ſtatute does not extend to liquors purchaſed for the purpoſe of being ſold again. (*v*)

In what caſes illegal contracts may be reſcinded, and when the money paid upon them may be recovered back, *Vide poſt*, Part III. Chap. VII. tit. *Money had and received on Illegal Contracts.*

(*u*) Vide *Smith* v. *Bromley*. Doug. 696.
(*v*) Vide Peake's Caſe, N. P. 180. *et. vid. poſt*, Part III. tit. Goods ſold.

CHAPTER

CHAPTER IV.

Of the Statute of Frauds and Perjuries upon Contracts and Agreements.

BEFORE the paſſing of the ſtatute 29 *Car.* 2. c. 3. contracts and agreements were moſt commonly entered into verbally, without any writing; but this giving riſe, as appears by the preamble of the act, to many fraudulent practices, which were endeavoured to be upheld by perjury and ſubornation of perjury, ~~the~~ the legiſlature deemed it expedient that certain contracts and agreements ſhould be reduced into writing, and ſigned by the party to be charged therewith, or by his agent: and accordingly by the 4th ſection of the above ſtatute it is enacted, "That from and after the 24th day of *June* 1677, no action ſhall be brought, whereby to charge any executor or adminiſtrator, upon any ſpecial promiſe, to anſwer damages out of his own eſtate; or whereby to charge the defendant upon any ſpecial promiſe to anſwer for the debt, default, or miſcarriages of another perſon; or to charge any perſon upon any agreement made upon conſideration of marriage; or upon any contract or ſale of lands, tenements or hereditaments, or any intereſt in or concerning them; or upon any agreement that is not to be performed within the ſpace of one year from the making thereof; unleſs the agreement upon which ſuch action ſhall be brought, or ſome *memorandum* or note thereof, ſhall be in writing, and ſigned by the party to be charged therewith, or ſome other perſon thereunto by him lawfully authorized."

And by the 17th ſection it is further enacted, "That, from and after the ſaid 24th day of *June*, no contract for the ſale of any goods, wares, and merchandizes, for the price of 10*l.* ſterling or upwards, ſhall be allowed to be good, except the buyer

ſhall

ſhall accept part of the goods ſo ſold, and actually receive the ſame, or give ſomething in earneſt to bind the bargain, or in part of payment, or that ſome note or *memorandum* in writing of the ſaid bargain be made and ſigned by the parties to be charged by ſuch contract, or their agents thereunto lawfully authorized.

Theſe two clauſes, which are the only parts of the ſtatute relating to the ſubject of this work, I propoſe to conſider in the following order:

1. *Of Promiſes by Executors and Adminiſtrators.*
2. *Of Promiſes to anſwer for the Debt, &c. of another.*
3. *Of Promiſes in Conſideration of Marriage.*
4. *Of a Contract or Sale of Lands.*
5. *Of Agreements not to be performed within a Year.*
6. *Of Contracts for the Sale of Goods.*
7. *Of the Contents and Signature, &c. of the Agreement required by the Statute;* and

Firſt, Of the contents and ſignature of a contract or ſale of *lands*.

Secondly, In what caſes the conſideration muſt be ſtated.

Thirdly, Of the contents and ſignature of a contract for the ſale of *goods*.

Fourthly, Of ſales by *auction* and by *brokers*.

1. *Of Promiſes by Executors and Adminiſtrators.*

The firſt branch of the 4th clauſe of the ſtatute enacts, that no action ſhall be brought whereby to charge any executor or adminiſtrator upon any ſpecial promiſe, to anſwer damages out of his own eſtate; unleſs the agreement upon which ſuch action ſhall be be brought, or ſome *memorandum* or note thereof, ſhall be in writing, and ſigned by the party to be charged therewith, or ſome other perſon thereunto by him lawfully authorized.

Now, to charge an executor or adminiſtrator upon any ſpecial promiſe to anſwer damages out of his own eſtate, it is not only neceſſary that the agreement ſhould be in writing, and ſigned by the party to be charged therewith, or by his agent, as directed by the ſtatute, but it is alſo neceſſary that the promiſe ſhould be made on a good conſideration: For the ſtatute has made no other alteration

of

of the common law reſpecting agreements, than merely declaring that they ſhall be evidenced by writing; (*a*) and the common law, as we have ſeen in a former chapter, requires that every promiſe ſhould be founded on a good conſideration.

Thus, in the caſe of *Rann* and another, executors of *Mary Hughes*, v. *Iſabella Hughes* adminiſtratix of *J. Hughes*, in error, (*b*) the declaration ſtated that on the 11th *June* 1761, divers diſputes had ariſen between the plaintiff's teſtator and the defendant's inteſtate, which they referred to arbitration; that the arbitrator awarded that the defendant's inteſtate ſhould pay to the plaintiff's teſtator 983*l.* That the defendant's inteſtate afterwards died poſſeſſed of effects ſufficient to pay that ſum; that adminiſtration was granted to the defendant; that *Mary Hughes* died, having appointed the plaintiffs her executors; that at the time of her death the ſaid ſum of 983*l.* was unpaid, "by reaſon of which pre-"miſes the defendant, as adminiſtratix, became liable to pay to the "plaintiffs, as executors the ſaid ſum, and being ſo liable ſhe in con-"ſideration thereof undertook and promiſed to pay, &c." A general judgment was entered in the court of *King*'s *Bench* againſt the defendant *de bonis propriis*. This judgment was reverſed in the *Exchequer Chamber*; and a writ of error was afterwards brought in the houſe of lords, where, after argument, the following queſtion was propoſed to the judges by the Lord Chancellor, "Whether ſufficient matter appeared upon the declaration to "warrant, after verdict, the judgment againſt the defendant in "error in her perſonal capacity;" upon which the Lord Chief Baron *Skynner* delivered the opinion of the judges to this effect:

"The ſtatute of frauds was made for the relief of perſonal re-"preſentatives and others, and did not intend to charge them fur-"ther than by common law they were chargeable." His lordſhip ſhowed that at common law the mere circumſtance of the teſtator being indebted was not a ſufficient conſideration; and, after referring to the clauſe of the ſtatute which relates to the preſent ſubject, he obſerved, "that the words were merely negative, and

(*a*) 1 Saund. 211. n. 2.
(*b*) 7 Term Rep. 350. n. a. *et vide ante*, chap. 2. p. 10.

" that executors and adminiſtrators ſhould not be liable out of their " own eſtates, unleſs the agreement upon which the action was " brought, or ſome memorandum thereof was in writing and ſigned " by the party. But this does not prove that the agreement was ſtill " not liable to be tried and judged of as all other agreements, merely " in writing, are by the common law, and does not prove the con- " verſe of the propoſition that when in writing the party muſt be " at all events liable." He ſaid " that all his brothers concurred with " him that in this caſe there was not a ſufficient conſideration to " ſupport this demand as a perſonal demand againſt the defendant, " and that its being now ſuppoſed to have been in writing makes " no difference. The conſequence of which is that the queſtion " put to us muſt be anſwered in the negative."

The word *agreement* in this ſection properly includes the conſideration, as well as the promiſe; and therefore the conſideration muſt form part of the written agreement. (*c*)

An executor before probate of the will is within the proviſion of this ſtatute; but an adminiſtrator does not come within it, until he has actually obtained adminiſtration. (*d*)

2. *Of Promiſes to anſwer for the Debt, Default or Miſcarriages of another Perſon.*

By the ſecond branch of the 4th clauſe it is enacted, " That no action ſhall be brought, whereby to charge the defendant upon any ſpecial promiſe to anſwer for the debt, default or miſcarriages of another perſon; unleſs the agreement upon which ſuch action ſhall be brought or ſome *memorandum* or note thereof, ſhall be in writing, and ſigned by the party to be charged therewith, or ſome other perſon thereunto by him lawfully authorized."

The promiſe here mentioned muſt be on behalf of a third perſon originally liable to be ſued; otherwiſe it is not within the ſtatute.

(*c*) *Vide poſt*, tit. In what Caſes the Conſideration muſt be ſtated.
(*d*) *Vide Roberts* on the Stat. of Frauds, 201.

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One of the leading caſes on this part of the ſtatute is *Buckmyr* v. *Darnall* (*a*), which was an action of *aſſumpſit*, wherein the plaintiff declared, that the defendant, in conſideration that the plaintiff, at the requeſt of the defendant, would let to hire, and deliver to one *Joſeph Engliſh*, a gelding of the plaintiff's, to ride to *Reading* in the county of *Berks*, undertook and promiſed the plaintiff that the ſaid *Joſeph* would deliver the ſaid gelding to the plaintiff.

Upon *non aſſumpſit* pleaded, this cauſe came to trial before *Holt*, Chief Juſtice, at *Weſtminſter Hall*; and the counſel for the Defendant inſiſting, that the plainliff ought to produce a note in writing of this promiſe within the ſtatute of frauds; and the Chief Juſtice doubting of it, a caſe was made for the opinion of the other judges. And it was argued for the defendant, that this caſe was within the ſtatute of frauds; for it was a promiſe to anſwer for the default and miſcarriage of the perſon the horſe was lent to; that the very letting out and delivery of the horſe to *Engliſh*, implied a contract by *Engliſh* to re-deliver it, and he was bound by law ſo to do, and conſequently the defendant was to anſwer for the default of another: that it had been ruled, that where an action will lie againſt the party himſelf, there an undertaking by a third perſon is within the ſtatute; but that where no action will lie againſt the party himſelf, it is otherwiſe.

To this it was anſwered for the plaintiff, that here the credit was wholly given to the defendant; that the rule mentioned by the counſel on the other ſide muſt be underſtood, where an action does or does not lie againſt the party himſelf on the contract and not where an action does or does not lie againſt him upon collateral reſpects. And therefore in this caſe for an actual converſion, or for refuſing to re-deliver the horſe, *Engliſh* might be charged in *trover* or detinue; yet he being not chargeable upon the contract, the caſe was not within the ſtatute. That this contract could not be ſaid properly to be a promiſe to anſwer for the default or miſcarriage of another, unleſs *Engliſh* were liable by the firſt contract.

(*a*) Lord Raym. 1085. 6 Mod. 248. 3 C.

Upon the firſt motion and argument of this caſe, the three judges (*f*) againſt *Powys* ſeemed to be of opinion, that this caſe was not within the ſtatute, becauſe *Engliſh* was not liable upon the contract; but if any action could be maintained againſt him, it muſt be for a ſubſequent wrong in detaining the horſe, or actually converting it to his own uſe. And *Powell*, juſtice, ſaid, "that that rule, of what things ſhall be within the ſtatute, is not "confined to thoſe caſes only, where there is no remedy at all "againſt the other, but where there is not any remedy againſt him "on the ſame contract." This caſe is juſt like the caſe where a man ſays "ſend goods to ſuch a one, and I will pay you;" that is not within the ſtatute; for the ſeller does not truſt the perſon he ſends the goods to. So here, the ſtable-keeper only truſted the defendant, and an action on the contract will not lie againſt *Engliſh*, but for a *tort* ſubſequent he may be charged in detinue, or *trover* and converſion, which is a collateral action.

Powys J. ſaid, "that there was a truſt to *Engliſh*, for the very "lending of the horſe neceſſarily implies a truſt to the perſon he "is lent to, and conſequently the defendant in this caſe is to "anſwer for the default of another, and is within the ſtatute."

Powell J. agreed, "that if a man ſhould ſay, *lend J. S. a horſe*, "*and I will undertake he ſhall pay the hire of it*; or *ſend J. S. goods*, "*and I will undertake he ſhall pay you*; that thoſe caſes would be "within the ſtatute: and agreed with *Powys*, that if any truſt "were given to *Engliſh*, then the caſe would be within the "ſtatute." But he, and the chief juſtice, and *Gould* held, that here was no credit given to *Engliſh*; and the chief juſtice agreed with him, that if there had, this promiſe would have been but an additional ſecurity, and within the ſtatute. And the chief juſtice ſaid, "that if a man ſhould ſay, "let J. S. ride your horſe to "*Reading*, and I will pay you the hire," that is not within the ſtatute, no more than if a man ſhould ſay, "deliver cloth to J. S. "and I will pay you." He ſaid alſo, that a bailee of an horſe for hire is not bound to re-deliver him at all events, but if he be robbed of him without fraud in him, he is excuſed. The principal caſe, however, was adjourned; and on a ſubſequent day the chief juſtice delivered the opinion of the court: he ſaid, "that

(*f*) *Holt* Ch. J. *Gould*. J. and *Powell* J.

"the

" the queſtion had been propoſed at a meeting of the judges, and " that there had been a great variety of opinions between them, " becauſe the horſe was lent wholly upon the credit of the de- " fendant; but that the judges of the court of King's Bench " were all of opinion that the caſe was within the ſtatute. The " objection that was made was, that if *Engliſh* did not re-deliver " the horſe, he was not chargeable in an action upon the promiſe, " but in trover, or detinue, which are founded upon the tort, " and are for a matter ſubſequent to the agreement. But I " anſwered, that *Engliſh* may be charged on the bailment in de- " tinue on the original delivery, and a detinue is the adequate " remedy, and upon the delivery *Engliſh* is liable in detinue, " and conſequently this promiſe by the defendant is collateral, " and is within the reaſon, and the very words of the ſtatute; " and is as much ſo, as if, where a man was indebted, J. S. in " conſideration that the debtee would forbear the man, ſhould pro- " miſe to pay him the debt; ſuch a promiſe is void, unleſs it be " in writing. Suppoſe a man comes with another to a ſhop to " buy, and the ſhop-keeper ſhould ſay, " I will not ſell him the " goods, unleſs you will undertake he ſhall pay me for them," " ſuch a promiſe is within the ſtatute: otherwiſe, if the man had " been the perſon to pay for the goods originally. So here, de- " tinue lays againſt *Engliſh* the principal; and the plaintiff having " this remedy againſt *Engliſh* the principal, cannot have an action " againſt the defendant the undertaker, unleſs there had been a " note in writing."

So, if A. promiſes B, being a ſurgeon, that if he will cure D. of a wound, he will ſee him paid; this is only a promiſe to pay if D. does not, and, therefore, it ought to be in writing by the ſtatute of frauds. But if A. promiſe in ſuch a caſe, that he will be B.'s paymaſter, whatever he ſhall deſerve, it is immediately the debt of A. and he is liable without writing (*g*).

A diſtinction is taken between a *conditional* and an *abſolute* undertaking; as if A. promiſe to pay B ſuch a ſum if C. does not, there A. is but a ſecurity for C. But if A. promiſe that C. will pay ſuch a ſum, A. is the principal debtor; for the act done was on his credit, and no way upon the credit of C. (*h*)

(*g*) *Per Holt* Ch. J. in *Watkins* v. *Perkins*, 1 Ld. Raym. 224.
(*h*) *Per Lee* Ch. J. in *Gordon* v. *Martin*, Fitzg. 303.

With reſpect, however, to *the ſale of goods*, the general line now taken is, that, if the perſon for whoſe uſe goods are furniſhed, be liable at all, any other promiſe by a third perſon to pay that debt muſt be in writing, otherwiſe it is void by the ſtatute (*i*).

Thus, in the caſe of *Jones* v. *Cooper* (*k*), which was an action for goods ſold and delivered: the facts were theſe: the defendant had frequently given written orders to the plaintiff to deliver goods of different kinds to one *Smith*, her ſon-in-law; in all of which ſhe undertook to be anſwerable for the payment. Theſe had been all punctually diſcharged. But the goods upon which the preſent queſtion aroſe were delivered to *Smith*, in conſequence of a *parol* order, and a *parol* promiſe by the defendant in theſe words; "I "will pay you if *Smith* will not." That the undertaking was before the delivery of the goods; but that *Smith* was entered as the debtor in the plaintiff's books.

Lord *Mansfield* C. J. delivered the opinion of the court as follows:

"We are all of opinion upon the authority of the caſes in the "books, that the promiſe by the defendant in this caſe to pay, if "*Smith* did not, is a collateral undertaking within the ſtatute of "frauds; and it is ſo clear that it would only be miſpending time "to go through the caſes, or to ſay much about it."

So, in the caſe of *Matſon* and another v. *Wharam* (*l*), which was alſo an action for goods ſold and delivered: the facts were as follow: In *January* 1785, the defendant *Wharam* applied to *Matſon*, one of the plaintiffs, and aſked him if he was willing to ſerve one *Robert Coulthard* of *Pontefract* with groceries; he anſwered they dealt with nobody in that part of the country, and did not know *Coulthard*; to which the defendant, *Wharam*, replied, if you do not know him, you know me, *and I will ſee you paid*. *Matſon* then ſaid he would ſerve him; and *Wharam* anſwered, he is a good chap, but I will ſee you paid. A letter was afterwards received by the plaintiffs from *Coulthard*, containing an order for goods to the amount of 7*l.* and the goods were afterwards ſent to *Coulthard* accordingly. The plaintiffs made *Coulthard the debtor* for theſe

(*i*) *Per Buller* J. 2 Term Rep. 81. (*k*) Cowp. 227.
(*l*) 2 Term Rep. 80.

goods

goods in their books. They afterwards applied to *Coulthard* for payment of the debt by letter, and receiving no anſwer, they then applied to the defendant, *Wharam*, who refuſed to pay the money.

There was no promiſe in writing made by the defendant: and the queſtion for the opinion of the court was, whether the plaintiffs were entitled to recover.

The court were of opinion, that this was a collateral promiſe to pay in caſe *Coulthard* did not, and therefore within the ſtatute; conſequently the plaintiff was not entitled to recover.

So, in the caſe of *Anderſon* v. *Hayman* (*m*), which was an action of *aſſumpſit*: at the trial, the jury found a verdict for the defendant on theſe facts: the plaintiff was a woollen-draper in *London*, and employed one *Biffin* as a rider to receive orders from his cuſtomers in the country. The defendant meeting with *Biffin* at *Deal*, deſired him to write to the plaintiff, requeſting him to ſupply the defendant's ſon (who traded to the *Weſt Indies*) with whatever goods he might want, on his, the defendant's credit, and at the ſame time ſaid, "Uſe my Son well, charge him "as low as poſſible, and I will be bound for the payment "of the money as far as 800*l.* or 1000*l.*." *Biffin* accordingly wrote to the plaintiff the following letter; "Mr. *Hayman* of "this town ſays his ſon will call on you, and leave orders, "and he has promiſed me to ſee you paid, if it amounts "to 1000*l.* Mr. *William Pitches* was alſo preſent as a witneſs."

"N. B. If deal for 12 month's credit, and pay in 6 or 8 "months, expects diſcount in proportion."—Soon after, the ſon received goods from the plaintiff to the amount of 800*l.* which were delivered to him in conſequence of the above-mentioned order from the father. The ſon was *debited* in the plaintiff's books, and being applied to for payment, wrote an anſwer to the plaintiff as follows:

"Your favour of the 27th paſt has been forwarded to me "from *Oſtend* by my clerk, in anſwer to which I can only ſay,

(*m*) 1 H. Bl. 120.

" that I underſtood your credit for the goods was 12 months, " which was alſo mentioned by your rider to my father. I ſhall " at this rate make you remittances for the different parcels as " they come due, and remain, &c.

" *Thomas Hayman, junior.*"

He afterwards became a bankrupt, and this action was brought againſt the father, to recover the value of the goods.

The court, on a motion for a new trial, were clearly of opinion, that this promiſe not being in writing, was void by the ſtatute of frauds, as it appeared from the evidence of the letter of *Hayman* the younger, that credit was given to him, as well as the defendant.

But, in the caſe of *Harris* v. *Huntbach*, (*n*) which was an action for money lent; the queſtion for the opinion of the court was, whether the promiſe was a *collateral* or *original* undertaking. It appeared from the evidence, that one *Davidſon* coming to the plaintiff by the defendant's order, for money to pay workmen, the plaintiff refuſed to pay the money, unleſs the defendant would ſign a receipt. Whereupon the defendant wrote the following note, viz. " Mr. *Harris* at the requeſt of the gardener, the work- " men wanting money greatly, for the work at the woodhouſes, " this is to certify that it is my requeſt you pay to Mr. *Davidſon*, " on the account of Maſter *Hillier*, for the workmen's uſe, the " ſum of 15l. as witneſs my hand, *S. Huntbach*," and a receipt was given by the ſaid *Davidſon*, the gardener, to the plaintiff, on the plaintiff's paying him this 15l.

It alſo appeared that Maſter *Hillier*, at the time the money was advanced, was an infant, and that the woodhouſes belonged to him.

The court determined that the note amounted to an *original* undertaking; and that there was nothing like a *collateral* requeſt or promiſe.

Mr. Juſt. *Fyler* ſaid, " The infant was not liable, and there- " fore it could not be a *collateral* undertaking. It was an *original* " undertaking of the defendant."

(*n*) 1 Bur. 373.

It

It is, however, in many caſes very difficult to diſcover from the mere expreſſions of the party, to whom the credit was originally given; and therefore, in ſome inſtances, it is deemed neceſſary to take into conſideration not only the expreſſions uſed, but the particular ſituation of the defendant at the time of his undertaking, and alſo the amount of the ſum for which he is ſuppoſed to have made himſelf liable.

Thus, in the caſe of *Keate* v. *Temple*, (*o*) which was an action for goods ſold and delivered, and work and labour. The principal facts proved at the trial were theſe: The plaintiff was a tailor and ſlop-ſeller at *Portſmouth*, and the defendant the firſt lieutenant of his Majeſty's ſhip the *Boyne*. When that ſhip came into port, the defendant applied to a third perſon to recommend a ſlop-ſeller who might ſupply the crew with new cloaths, ſaying, "He will run no riſk; I will ſee him paid." The plaintiff being accordingly recommended, the defendant called upon him, and uſed theſe words, "I will ſee you paid at the pay-table; are you "ſatisfied?" He anſwered, "perfectly ſo." The cloaths were delivered on the quarter deck of the *Boyne*: ſlops are uſually ſold on the main deck: the plaintiff produced ſamples to aſcertain whether his directions had been followed; ſome of the men ſaid that they were not in want of any cloaths, but were told by the defendant that if they did not take them, he would puniſh them; and others, who ſtated that they were only in want of a part of a ſuit, were obliged to take a whole one, with anchor buttons to the jacket, ſuch as are uſually worn by petty officers only. The cloathing of the crew in general was light, and adapted to the climate of the *Weſt Indies*, where the ſhip had been laſt ſtationed. Soon after the delivery, the *Boyne* was burnt; and the crew diſperſed into different ſhips. On that occaſion, the plaintiff having expreſſed ſome apprehenſions for himſelf, was told by the defendant "Cap-"tain *Grey* (the captain of the *Boyne*) and I will ſee you paid; "you need not make yourſelf uneaſy." After this the commiſſioner came on board the *Commerce de Marſeilles*, in order to pay the crew of the *Boyne*; at which time the defendant ſtood at the pay-table, and having taken ſome money out of the hat of the firſt man who was paid, gave it to the plaintiff; the next man refuſed to part with his pay, and was immediately put in irons. The defendant then aſked the commiſſioner to ſtop the pay of the crew, who anſwered that it could not be done.

(*o*) 1 Boſ. and Pul. 158.

The learned judge, (*p*) before whom the cauſe was tried, in his direction to the jury ſaid, "that if they were ſatisfied on the evidence, that the goods in queſtion were advanced on the credit of the defendant, as immediately reſponſible, the plaintiff was entitled to a verdict; but if they believed, that at the time when the goods were furniſhed, the plaintiff relied on being able, through the aſſiſtance of the defendant to get his money from the crew, they ought to find for the defendant." The jury found a verdict for the plaintiff 576*l.* 7*s.* 8*d.*

But the Court of *Common Pleas* afterwards directed a new trial upon the following grounds ſtated by Lord Ch. J. *Eyre*, in delivering the opinion of the court: "There is one conſideration, independent of every thing elſe, which weighs ſo ſtrongly with me, that I ſhould wiſh this evidence to be once more ſubmitted to a jury. The ſum recovered is 576*l.* 7*s.* 8*d*, and this againſt a lieutenant of the navy: a ſum ſo large, that it goes a great way towards ſatisfying my mind that it never could have been in the contemplation of the defendant to make himſelf liable, or of *the ſlop-ſeller to furniſh the goods on his credit* to ſo large an amount. I can hardly think that had the *Boyne* not been burnt, and the plaintiff been aſked whether he would have the lieutenant or the crew for his paymaſter, but that he would have given the preference to the latter. The circumſtance of this caſe creates ſome prejudice againſt the defendant, but which I think capable of explanation. There is ſome appearance of harſhneſs in making the men purchaſe theſe cloaths againſt their inclination. But it was in evidence, that though they were pretty well cloathed, yet their cloaths were adapted to a warm climate rather than to the ſervice in which they were to be engaged. It was therefore the bounden duty of the officer to take ſome courſe to oblige the crew to purchaſe proper neceſſaries. We all know that a ſailor is ſo ſingular a creature, ſo careleſs of himſelf, that he cannot, though his life depend upon it, be prevailed upon, without force, even to bring up his hammock upon deck to be aired. We know that he will riſk any danger in order to employ his money in a way that he likes, rather than lay it out in that provident method which his ſituation may require. The whole of the imputation then on the defendant and Captain *Grey* amounts to this, that when the men were to be

(*p*) *Lawrence.*

cloathed, they wiſhed them to be ſomewhat well dreſſed. I do not know but that this circumſtance may have had ſome influence on the jury. But I do not feel the force of it when oppoſed to the weight of the evidence on the other ſide, ſo as to make the officer liable for ſo large a ſum. From the nature of the caſe it is apparent that the men were to pay in the firſt inſtance: the defendant's words were, "I will ſee you paid at the pay-table; are you ſatisfied?" And the anſwer then was "perfectly ſo." The meaning of which was, that however unwilling the men might be to pay themſelves, the officer would take care that they ſhould pay. The queſtion is, whether the ſlopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant, who, if we are to judge of him by others in the ſame ſituation, was not likely to be able to raiſe ſo large a ſum? Conſidering the whole bearing of the evidence, and that the learned judge who tried the cauſe has not expreſſed himſelf ſatisfied with the verdict, I think this a proper caſe to be ſent to a new trial.

In the caſes which are now about to be mentioned upon the ſame branch of the ſtatute, theſe points have been eſtabliſhed, namely, if the perſon who makes the promiſe was in any reſpect liable *originally* to the debt, either *alone* or *jointly* with others, it does not come within the ſtatute.

So, if there be any conſideration moving to the party making the promiſe, it is out of the ſtatute, though the debt of another be the original cauſe of the undertaking.

So, if it be part of the agreement that the original debtor ſhall be diſcharged, that is a ſufficient conſideration to ſupport the undertaking of another to pay the debt, and the agreement need not be in writing: but if no ſuch ſtipulation be made, and the original debt be permitted to ſubſiſt, the undertaking is merely *collateral*, and the agreement muſt be in writing.

So, where nothing more is ſtipulated for than an indulgence to the debtor, or that an action commenced ſhall be ſtayed; the undertaking of a third perſon to pay the debt is within the ſtatute; for the original debt ſtill continues, and the undertaking is but collateral. (*q*)

(*q*) Vide 1 New. Rep. C. B. 127.

So,

So, a verbal promiſe to pay the debt of another, and alſo to do ſome other act is void by the ſtatute; the contract being *entire*.

Thus, in the caſe of *Stephens* v. *Squire*, (*r*) which was an action of *aſſumpſit* to pay 10*l.* and coſts. The facts were theſe: an action had been brought againſt the defendant and two others; and the cauſe was carried down to be tried at the aſſizes; but the defendant promiſed, in conſideration that the plaintiff would not proſecute the action, that he would pay 10*l.* and coſts of ſuit. The queſtion was whether this was a void promiſe by the ſtatute of frauds, it not being in writing?

The court determined, that this could not be ſaid to be a promiſe for another perſon, but for the defendant's own debt; and therefore not within the ſtatute.

So, in the caſe of *Read* v. *Naſh*, (*s*) the facts were theſe: *Tuack*, the plaintiff's teſtator brought an action of aſſault and battery againſt one *Johnſon*. The cauſe being at iſſue, the record entered, and juſt coming on to be tried, the defendant *Naſh* being then preſent in court, in conſideration that *Tuack* would not proceed to trial, but would withdraw his record, promiſed to pay *Tuack* 50*l.* and the coſts in that cauſe, to be taxed till the time of withdrawing the record, in which taxation all ſuch ſums of money were to be allowed as *Tuack* had paid and was liable to pay to his attorney and witneſſes who attended the ~~the~~ trial. *Tuack*, relying upon this promiſe, did withdraw his record, and no further proceeding was had in that cauſe. *Tuack* being dead, *Read*, his executor, brought an action upon this ſpecial promiſe, which was merely *verbal*, and not reduced into writing.

The caſe was twice argued at the bar; and, after time taken by the court to conſider it, *Lee*, Ch. J. delivered the opinion of the court as follows:

"The ſingle queſtion is, whether this promiſe which is confeſſed by the demurrer not to have been in writing, is within the ſtatute of frauds and perjuries? that is to ſay, whether it be a promiſe for the debt, default, or miſcarriage of another perſon?

(*r*) 5 Mod. 205. Comb. 362. S. C. (*s*) 1 Wils. 305.

And

And we are all of opinion that it is not, but that it is an original promiſe, ſufficient to found an *aſſumpſit* upon againſt *Naſh*, and is a lien upon *Naſh*, and upon him only. *Johnſon* was not a debtor; the cauſe was not tried, he did not appear to be guilty of any default or miſcarriage; there might have been a verdict for him if the cauſe had been tried, for any thing we can tell; he never was liable to the particular debt, damages, or coſts. The true difference is between an *original* promiſe, and a *collateral* promiſe; the *firſt* is out of the ſtatute, the *latter* is not when it is to pay the debt of another which was already contracted."

So, in the caſe of *Williams* v. *Leper*, (*t*) the facts were as follow: *Taylor*, a tenant of the plaintiff, being in arrear for rent, to the amount of 45*l.* for three-quarters of a year, and inſolvent, conveyed all his effects for the benefit of his creditors. They employed *Leper*, the defendant, as a broker, to ſell the effects, who accordingly advertiſed a ſale. On the morning advertiſed for the ſale, *Williams*, the landlord, came to diſtrain the goods in the houſe. *Leper* having notice of the plaintiff's intention to diſtrain them, promiſed to pay the arrear of rent, *if he would deſiſt from diſtraining*. *Williams* on the faith of this promiſe, accordingly deſiſted. At the trial, a verdict was found for the plaintiff for 45*l.*; but the queſtion for the opinion of the court was, whether this was ſuch a ſpecial promiſe for the debt of another, as was within the ſtatute of frauds?

The counſel for the plaintiff contended that this ſtatute only meant to prevent *parol* promiſes, where there was no new conſideration moving from the party making the promiſe to the party to whom it was made: that the legiſlature did not mean to prevent direct undertakings, but only collateral ones, for the debt, default, or miſcarriage of others. Whereas here was a new conſideratition; for the goods of *Leper* were, at the time of the promiſe, liable to the landlord's diſtreſs. It was therefore, a direct undertaking for himſelf, and not for another. The plaintiff had a legal intereſt in theſe goods, prior to the bill of ſale, and was deprived by the defendant of an advantage, which he could never have again. The property of the goods was in *Leper*, as a truſtee for the creditors, at the time when he made this promiſe.

(*t*) 3 Bur. 1886. 2 Wils 308. S. C.

The

The counſel for the defendant inſiſted, that upon this declaration, coupled with the facts given in evidence, the plaintiff had no right to recover this 45*l.* For the declaration expreſsly charged 'that *Taylor* was indebted to the plaintiff in 45*l.* for three quarters of a year's rent, and that the defendant undertook to pay it;' which was directly within the words of the ſtatute of frauds. That *Leper* was in poſſeſſion of the goods of the tenant, who owed the plaintiff three-quarters rent; and being about to ſell them, the landlord came to diſtrain for this rent in arrear; and *Leper* promiſed to pay it, if he would deſiſt from diſtraining. He promiſed abſolutely to pay it, and not to pay it out of the goods ſold, or under any other reſtriction.

But Lord *Mansfield*, Ch. J. ſaid, "the caſe has nothing to do with the ſtatute of frauds. The *res geſta* would entitle the plaintiff to his action againſt the defendant. The landlord had a legal pledge: He entered to diſtrain; he had the pledge in his cuſtody. The defendant agreed, 'that the goods ſhould be ſold, and the plaintiff paid in the firſt place.' The goods were the fund: the queſtion was not between *Taylor* and the plaintiff. The plaintiff had a lien on the goods. *Leper* was a truſtee for all the creditors, and was obliged to pay the landlord, who had the prior lien: this has nothing to do with the ſtatute of frauds. *Wilmot* and *Yates*, Juſtices; were of opinion, that this was an original promiſe; and Mr. *J. Aſton* ſaid, "he looked upon the goods to be the debtor; and that *Leper* was not bound to pay the landlord more than the goods ſold for, in caſe they had not ſold for 45*l.* The goods were a fund between both: and on that foot he concurred."

The principle upon which this caſe was determined was recognifed in *Heulditch* v. *Milne*. (*u*) It was an action of *aſſumpſit* for the repair of carriages; and the facts in ſupport of it were, that certain carriages which belonged to Mr. *Copey* had been ſent by the defendant to the plaintiff's to be repaired, but the orders concerning them were given by the defendant. One of the carriages had been brought by Mr. *Copey* himſelf, and paid for by him; and the bill, which was the object of the action, contained a charge for repairs done to this carriage, and was made out in the name of *Copey*. When the carriages were repaired, the defendant ſent an order to pack them up, and ſend them on board ſhip; the plaintiff upon this ſent to him to know who was to pay for them: the

(*u*) 3 Eſp. Rep. 86.

defendant

defendant ſaid he had ſent them, and he would pay for them. The carriages were afterwads packed up and ſent on board ſhip, and the bill was made out and delivered to the defendant; he deſired time to look over it; and when the plaintiff's clerk called a ſecond time, he ſaid the charges appeared very high; but deſired the clerk to call in a few days, and he would ſettle it. Not having done ſo, the plaintiff's attorney waited upon him, when the defendant ſaid, that he had been told that the bill was a moſt exhorbitant one, and a fit ſubject to refer. However, he ſaid, he had money to pay it, though he did not ſay, whether it was his own or *Copey*'s. Upon theſe facts it was contended, on behalf of the defendant, that this caſe was within the ſtatute of frauds. But Lord *Eldon*, Ch. J., before whom the cauſe was tried, ſaid, "If a perſon obtained poſſeſſion of a tenant's goods on which the landlord had a right to diſtrain for rent, and he promiſed to pay the rent, though it was clearly the debt of another, yet a note in writing was not neceſſary; that ſuch a caſe appeared to apply preciſely to the one before him. The plaintiff had to a certain extent a lien upon the carriages, which he parted with on the defendant's promiſe to pay. His lordſhip therefore was of opinion that that circumſtance took the caſe out of the ſtatute, and conſequently that the defendant was liable for the amount of the bill."

So, in the caſe of *Caſtling* v. *Aubert*, (*v*) where the following caſe was ſtated for the opinion of the Court of *King*'s *Bench*.

The plaintiff was employed by one *E. P. Grayſon* as his general agent; and, as an inſurance broker, had effected for his uſe certain policies of aſſurance mentioned in the declaration, of the value of 3000*l.*; that the plaintiff was under acceptances for *Grayſon*, for bills drawn by *Grayſon* for his own accommodation; and that the plaintiff had a lien on the ſaid policies to indemnify himſelf againſt his ſaid acceptances. That a loſs having happened on the policies of inſurance, which the underwriters had agreed to pay, but which *Grayſon* could not receive without having the policies to produce, the plaintiff was applied to, to give them up for that purpoſe to the defendant, into whoſe hands *Grayſon* had at that time tranſferred the management of his inſurance concerns. That ſome of the plaintiff's ſaid acceptances for the uſe of *Grayſon* being then

(*v*) 2 East. 325.

outſtanding

outſtanding and unpaid, and particularly the bill for 181*l.* 1*s.* mentioned in the declaration then in the hands of one *Cator*, upon which writs had been ſued out (though not then executed) againſt *Grayſon* as the drawer, and the plaintiff as acceptor; the plaintiff refuſed to deliver up the policies of aſſurance, they being the only ſecurities he had againſt his ſaid acceptances, without an indemnity; and that thereupon a meeting was held between the plaintiff and defendant and *Grayſon*, at which it was verbally agreed between the parties that the defendant ſhould pay into the hands of a banker 712*l.* 13*s.* 6*d.*, to anſwer in part certain other acceptances of the plaintiff's, excluſive of the bill for 181*l.* 1*s.*; and that the plaintiff ſhould provide 211*l.* 14*s.* 6*d.* towards paying one of his acceptances for 350*l.*; and that the defendant ſhould pay the bill of 181*l.* 1*s.* and the coſts of the action which had been brought thereon againſt *Grayſon*, amounting together to 202*l.*; and that thereupon the ſaid policies ſhould be delivered up to the defendant. That in purſuance of this agreement the defendant paid into the banker's hands 712*l.* 13*s.* 6*d.* and the plaintiff delivered up the policies to the defendant. That the defendant received from the underwriters the amount of the ſubſcriptions on the policies ſo delivered up to him by the plaintiff. That the defendant was afterwards called upon by the attorney of *Cator* to pay the ſaid 202*l.* for the debt and coſts on the bill in *Cator*'s hands, but refuſedto do ſo; nor had he paid it at the time this action was commenced; and that in conſequence of ſuch refuſal the plaintiff was arreſted at the ſuit of *Cator*, as acceptor of the ſaid bill of exchange, and ſuſtained damages thereby to the amount found by the jury, *viz.* 25*l.* The queſtion for the opinion of the court was, whether the promiſe of the defendant to pay the ſaid 202*l.* due from *Grayſon* for the ſaid debt and coſts, on having the ſaid policies of inſurance delivered to him, was void under the ſtatute of frauds; or whether he were liable by reaſon of the plaintiff's parting with the poſſeſſion of thoſe policies upon which the plaintiff had a lien, and which were ſo depoſited with the defendant?

The Court were of opinion, that this was not a promiſe for the debt or default of another within the ſtatute of frauds, but an *original* undertaking.

Lord *Ellenborough*, Ch. J. ſaid, "I am clearly of opinion, that this is neither an undertaking for the debt, default or miſcarriage of another within the ſtatute. It could not be for the *debt*, but rather for the *credit* of another; for when the promiſe was made,

no

no debt was incurred from *Grayſon* to the plaintiff; therefore, if at all within the ſtatute, it muſt be for the default or miſcarriage of another. But ſee what the caſe is: the plaintiff who was *Grayſon's* broker, had policies of inſurance in his hands belonging to his principal, which were ſecurities on which he had a lien for the balance of his account; and on the faith of theſe he agreed to accept bills for the accommodation of his principal. One of theſe bills became due, and actions were brought againſt the plaintiff as acceptor, and againſt *Grayſon* as drawer: and it was deſirable that the policies ſhould be given up by the plaintiff to the defendant, in order to enable the money for the loſſes incurred to be received from the underwriters; the defendant undertaking, upon condition the policies were made over to him, to ſettle the acceptances due, and to lodge money in a banker's hands for the ſatisfaction of the remainder, as they became due. The defendant then procured from the plaintiff the ſecurities upon the faith of this engagement; in entering into which he had not the diſcharge of *Grayſon* principally in his contemplation, but the diſcharge of himſelf. That was his moving conſideration, though the diſcharge of *Grayſon* would eventually follow. It is rather therefore a purchaſe of the ſecurities which the plaintiff held in his hands. This is quite beſide the miſchief provided againſt by the ſtatute; which was that perſons ſhould not by their own unvouched undertaking without writing charge themſelves for the debt, default, or miſcarriage of another. In the caſe of a bill of exchange for which ſeveral perſons are liable, if it be agreed to be taken up and paid by one, eventually others may be diſcharged; and the ſame objection might be made there: but the moving conſideration is the diſcharge of the party himſelf, and not of the reſt, though that alſo enſues. Upon the whole therefore I agree with the deciſion in *Williams* v. *Leper* (*u*) to the full extent of it: I agree with thoſe of the judges who thought the caſe not within the ſtatute of frauds at all: and I alſo agree with the ground on which Mr. Juſtice *Aſton* proceeded, that the evidence ſuſtains the count for money had and received."

So, in the caſe of *Anſley* v. *Marden*, (*w*) which was an action of *aſſumpſit* tried before Sir *James Mansfield*, Ch. J. and, upon the trial, it appeared in evidence, that the defendant being in diſtreſſed circumſtances, the plaintiff and three other cre-

(*u*) *Ante*, 61. (*w*) 1 New Rep. C. B. 124.

ditors of the defendant met, and finding that he could only pay 7*s.* 6*d.* in the pound, they came to an agreement to accept from one *T. Weſton*, the defendant's father in-law, 10*s.* in the pound in ſatisfaction of the debts due to them from the defendant, and to aſſign thoſe debts to the ſaid *T. Weſton*; and an agreement was accordingly prepared for that purpoſe.—The three other creditors ſigned this agreement, and received their reſpective ſums of money, to the amount of 10*s.* in the pound from *T. Weſton*, and the plaintiff at one time authoriſed *Greenwood* (one of the three creditors who ſigned) to ſign for him when he ſigned for himſelf; but *Greenwood* having omitted ſo to do, the plaintiff revoked his authority, and refuſed to execute the agreement, or accept the 10*s.* in the pound on his debt. On behalf of the plaintiff it was objected, that *Weſton's* undertaking to pay 10*s.* in the pound in diſcharge of the defendant's debt was void by the ſtatute of frauds, no agreement by which *Weſton* could be charged having been ſigned by him, and therefore the plaintiff's undertaking to accept 10*s.* in the pound was *nudum pactum*. But the Chief Juſtice ruled that the undertaking of *Weſton* was not within the ſtatute of frauds, *being an undertaking to pay a debt of a new deſcription, viz.* 10*s. in the pound, in conſideration of* Marden *being diſcharged, and not an undertaking to pay the debt of* Marden. Accordingly a verdict was found for the defendant, who had paid into court the amount of the 10*s.* in the pound on the plaintiff's debt. And the Court of Common Pleas afterwards, upon a rule to ſhew cauſe why there ſhould not be a new trial, confirmed his Lordſhip's opinion, and determined, that this agreement was not within the ſtatute; it not being a collateral promiſe to pay the debt of another, but an *original contract to purchaſe the debts*.

Sir *James Mansfield*, Ch. J. ſaid, "At the trial of this cauſe, it was objected on the part of the plaintiff, that the promiſe by *Weſton* was a promiſe within the ſtatute of frauds, and therefore no bar to the plaintiff's demand. It appeared to me doubtful how far the promiſe in this caſe could be deemed to be within the ſtatute; and it rather ſtruck me that being a promiſe to pay only 10*s.* in the pound, and not to pay the whole debt, it was an original agreement, and therefore was not within the ſtatute. I did not ſee how one perſon could undertake for the debt of another, when the debt for which he was ſuppoſed to undertake, was diſcharged by the very bargain. No caſes, however, were at that time cited. We have now been conſidering all the circumſtances of the caſe, and

and the question is, whether justice will not be done by not allowing the plaintiff to take more than what the strictest rule of law will entitle him to? The facts were shortly these. The defendant was upon a brink of a bankruptcy; some of his creditors met to consider what should be done, and his effects being found only sufficient to pay 7*s.* 6*d.* in the pound, the creditors agreed to accept 10*s.* in the pound from *Weston* in full satisfaction of their debts, and undertook to assign their debts to him. The only object of the deed was the assignment of the debts; and *Weston* was to pay 10*s.* in the pound as the price of those debts. After this the plaintiff went out of town, and some of the creditors accepted 10*s.* in the pound, and assigned their debts to *Weston*. The plaintiff thought proper, first to deny his agreement, and then to insist on his right to change his mind and refuse to execute the deed. He had a right to change his mind, but in point of morality and found honesty his conduct was extremely bad. It was equivalent to obtaining a promise from *Marden* privately for payment of the whole debt, after agreeing with the rest of the creditors, to take a part only. He now comes here to set aside the verdict, in order to put into his pocket the other part of the debt for his own benefit, to which *Weston* is entitled. Supposing the promise by *Weston* to be a good promise in law, the plaintiff cannot recover the original debt due from the defendant to himself, inasmuch as he has agreed to accept 10*s.* in the pound in satisfaction of that debt, and to assign it to *Weston*, who is contented with the verdict. The plaintiff has clearly been guilty of very harsh treatment towards the defendant; and I do not think the court called upon to alter the verdict, as a favour to him.—He has acted altogether contrary to honour and justice, and I think the verdict ought to stand. I would not have it supposed that I mean to throw any doubt upon the decisions which have been cited respecting the statute of frauds. The case of *Chater* v. *Beckett*, (*x*) certainly decides that a mere promise, such as that before us, would be within the statute; and indeed, upon general principles, no one can wish to restrain the operation of the statute of frauds. The benefits of that statute are much more apparent to those who are conversant with the practice of the court of Chancery, than those who have only seen the practice of the courts of common law. But upon the whole, it appears to me that the agreement by *Weston* amounted to a purchase of the plain-

(*x*) *Esp.* 90.

tiff's debt, and that this application for a new trial ought not to be granted."

But, a promiſe to pay the debt of a third perſon in *conſideration of forbearance only*, is within the ſtatute, and muſt therefore be in writing.

Thus, in the caſe of *Fiſh* v. *Hutchinſon*, (*y*) which was an action of *aſſumpſit*, the plaintiff declared, that whereas one *Vickars* was indebted to him in a certain ſum of money, and had commenced an action for the ſame; the defendant in conſideration that the plaintiff would ſtay his action againſt *Vickars* promiſed to pay plaintiff the money owing to him by *Vickars*. To this there was a demurrer and joinder in demurrer.

For the defendant it was inſiſted, that this being a promiſe to pay the debt of another perſon, was void by the ſtatute of frauds and perjuries.

It was anſwered for the plaintiff, that this was an original contract between the plaintiff and defendant, ſo not within the ſtatute; and the caſe of *Read* v. *Naſh*, (*z*) was cited as in point.

But *per totam curiam*. "This caſe at bar is very clearly within the ſtatute, for here is a debt of another perſon ſtill ſubſiſting, and a promiſe to pay it: and it is not like the caſe of *Read* v. *Naſh*, for that was an action of aſſault and battery brought by the plaintiff's teſtator againſt one *Johnſon*; the cauſe was at iſſue, the record of *niſi prius* entered, and juſt coming on to be tried, when the defendant *Naſh*, being preſent in court, in conſideration that plaintiff's teſtator would not proceed to try his cauſe, but would withdraw his record, promiſed to pay him 50*l.* and coſts to be taxed in that ſuit; ſo in that caſe there was no debt of another, it being an action of battery, and it could not be known before trial whether the plaintiff would recover any damages or not; but in the preſent caſe here is a debt of *another* ſtill ſubſiſting, and a promiſe to pay it."

So, a promiſe by the indorſer of a diſhonoured note, to indemnify the holder if he will proceed to enforce the payment againſt the other parties thereon, muſt be in writing, otherwiſe it is void.

(*y*) 2 Wils. 94. Stra. 873. S. P. (*z*) 1 Wils. 305. *et ante*, 60.

Thus,

Thus, in the case of *Winckworth* v. *Mills*, (*a*) which was an action of *assumpsit* for money paid, laid out, and expended to the defendant's use, with a count against him as indorser of a promissory note; the report states that the plaintiff was indorsee of one *Brough*, who was the indorsee of the defendant, who was himself the indorsee of *Taylor* and son of a promissory note drawn by one *Sharp* in favour of *Taylor* and son, for 60*l.* payable three months after date, at *Taylor*'s house. When the note became due, the plaintiff's clerk called for payment of it at *Taylor*'s house, but by mistake left it behind; he immediately returned and informed *Taylor* and son of the circumstance, and demanded the note, but they denied having it, and it was considered as lost.

The plaintiff and *Brough* immediately waited on the defendant, and informed him of the circumstance. Whereupon he furnished them with a copy of the note, and promised if they would endeavour to recover the amount of it from *Taylor* and son, or from *Sharp*, that he would indemnify them. They applied to *Sharp*, whom they found was a man of no substance. They afterwards applied to *Taylor* and son, and they on being threatened paid 30*l.* in part, and gave a new security by a note for the remaining 30*l.* But this last note not being paid when due, an action was brought on it against *Taylor* and son, and a judgment obtained by default; they, however, brought a writ of error on the judgment, and then became bankrupts. Upon this *Winckworth*, the plaintiff, brought this action to recover from *Mills*, the defendant, the expences he had been put to in endeavouring to recover the money from *Taylor* and son, on *Mills*' promise of indemnifying him, and added a count against him as indorser of the original note.

Lord *Kenyon* asked if there had been any note in writing from *Mills* to the plaintiff, promising to indemnify him in the manner stated. He was answered in the negative; but it was contended that it was not necessary, *Mills* the defendant being himself a party to the note, and to be benefited by the proceedings against *Taylor*.

His Lordship then added, "that he was of opinion the action could not be supported, to recover that part of the demand claimed under the promise of indemnity; that it was a promise

(*a*) 2 Esp. Rep. 484.

for the debt and default of another, and so could not under the statute of frauds be maintained without a note in writing; but as to the unpaid part of the original note, the plaintiff was entitled to recover it."

So, a *parol promise to pay the debt of another, and also to do some other act*, is void by the statute; *the contract being entire.*

Thus, in the case of *Chater* v. *Beckett*, (*b*) which was an action of assumpsit on a special agreement, and for money paid, tried before Lord *Kenyon*. At the trial, the plaintiff's counsel stated, that the facts of the case were these: that the plaintiff, who had struck a docket against *J. Harris*, was induced not to prosecute the commission of bankrupt, but to sue him at law for the recovery of his debt, and having sued out a writ against him, some of *Harris's* creditors were anxious to take a composition for their debts, provided all of them would agree to it; and to effect this scheme the plaintiff called several meetings of *Harris's* creditors, at the last of which a composition of 10*s.* in the pound was proposed, which all the creditors, except the plaintiff, consented to take: but as the plaintiff had been put to great expences, in striking the docket against *Harris*, suing out a writ, and calling the creditors together, he would not agree to take that composition unless those expences were also paid, in consequence of which the defendant promised to pay those expences, and to accept bills drawn by the plaintiff on him to the amount of the composition. The plaintiff accordingly drew bills on the defendant to that amount, which the latter accepted and paid: but the defendant refusing to pay the plaintiff's expences, amounting to 20*l.* 13*s.* the plaintiff paid them to the attorney, and brought this action to recover the same from the defendant on his undertaking. But this undertaking not being in writing, Lord *Kenyon* was of opinion that the case came within the statute of frauds, and nonsuited the plaintiff on his opening; referring to the case of *Read* v. *Nash*. (*)

A rule *nisi* was afterwards obtained to set aside the nonsuit; and when the case was called on, the plaintiff's counsel said,

(*b*) 7 Term Rep. 201. See also *Coke* v. *Tombs*, Anstr. 420. *Lea* v. *Barber*, Ib. 425.

(*) 1 Wils. 305. *et ante*, 60.

that

that even though this were a caſe within the ſtatute of frauds, the plaintiff might recover on the general count for money paid to the uſe of the defendant.

But the court were of opinion againſt the plaintiff on both points, and decided that the caſe was within the ſtatute.

Lord *Kenyon* Ch. J. ſaid, "When this cauſe came on to be tried, I referred to the caſe of *Read* v. *Nash*, to ſhow that it was a caſe within the ſtatute of frauds: and though the court ruled that that caſe itſelf was not within the ſtatute, what was ſaid by Lord Chief Juſtice *Lee* is deciſive to ſhow that this promiſe is void by the ſtatute. That was an action not founded on any debt, but for an aſſault; and he ſaid "*Johnſon* was not a debtor; the cauſe was not tried; he did not appear to be guilty of any default or miſcarriage; there might have been a verdict for him, if the cauſe had been tried; he never was liable to the particular debt, damages, or coſts." Whereas in this caſe *Harris* was indebted to the plaintiff, and the defendant undertook to pay part of that debt, and to pay certain other expences. The promiſe therefore was certainly void in part by the ſtatute; and the agreement being entire, the plaintiff cannot now ſeparate it, and recover on one part of the agreement, the other being void. And if that agreement be void, there is an end of the caſe; for where there is an expreſs promiſe, another promiſe cannot be implied. I lament extremely that exceptions were ever introduced in conſtruing the ſtatute of frauds; it is a very beneficial ſtatute, and if the courts had at firſt abided by the ſtrict letter of the act, it would have prevented a multitude of ſuits that have ſince been brought."

Lawrence J. ſaid, "It is clear that the plaintiff cannot recover on the ſpecial counts. Then the queſtion is, whether on the tranſaction, as ſtated, he can ſupport the general count for money paid to the uſe of the defendant? The defendant's was not a promiſe to pay the attorney, but to pay the plaintiff the expences that he had incurred: but the plaintiff was originally liable to pay theſe expences to his own attorney; and when he paid them, he only paid his own debt; therefore this cannot be conſidered as money paid to the uſe of the defendant."

It ſhould be obſerved, that in all thoſe caſes which come within that part of the ſtatute we have now been conſidering, the

conſideration, as well as the promiſe, muſt be ſtated in the agreement, otherwiſe it will be void. (*c*)

3. *Of Promiſes in conſideration of Marriage.*

In the next branch of the fourth clauſe of the ſtatute of frauds, it is enacted, that no action ſhall be brought whereby to charge any perſon upon any agreement made upon conſideration of marriage, unleſs the agreement upon which ſuch action ſhall be brought, or ſome *memorandum* or note thereof, ſhall be in writing, and ſigned by the party to be charged therewith, or ſome other perſon thereunto by him lawfully authorized.

Very ſoon after the paſſing of the act it was holden, that this branch of it extended as well to mutual promiſes to marry, as to an agreement in conſideration of marriage.

Thus, in the caſe of *Philpott* v. *Wallet*, (*d*) which was an action of *aſſumpſit*, in conſideration that the plaintiff, at the requeſt of the defendant, would conſent to take him to be her huſband, the defendant promiſed to take her to be his wife; and that the plaintiff was ready, and offered to take the defendant to be her huſband, but he refuſed. This promiſe was made without any writing; it was therefore contended that it was void by the ſtatute; but it was anſwered, that this was no promiſe within the ſtatute, which was only intended of promiſes for payment of money upon marriages, and not of promiſes to marry.

But the court reſolved, that this promiſe is directly within the words, and not out of the intent of the ſtatute; becauſe the promiſe is, that in conſideration the one would marry the other, the other would marry him, and therefore it is a promiſe in conſideration of marriage.

This conſtruction of the ſtatute, however, was afterwards much doubted, and in ſome caſes denied; (*e*) and it is now finally ſettled, that mutual promiſes to marry need not be in writing by the ſtatute of frauds.

(*c*) Vide *poſt*. tit. *In what Caſes the Conſideration muſt be ſtated.*
(*d*) 3 Lev. 65. (*e*) Vide Lord Raym. 387.

Thus,

Thus, in the caſe of *Cork* v. *Baker*, (*f*) the plaintiff declared, that in conſideration ſhe promiſed to marry the defendant, he promiſed to marry her at his father's death, who was ſince dead, but the defendant refuſed ſo to do, and had afterwards married A. B.

The defendant moved in arreſt of judgment, that this *parol* promiſe was not good in law. But, after argument, it was held, that this was not within the ſtatute of frauds and perjuries, which relates only to contracts in conſideration of marriage; and that the caſe in 3 Lev. 411. (*g*) had been contradicted by later reſolutions.

A parol agreement to pay money, or make a ſettlement in conſideration of marriage, if not reduced into writing, previous to the marriage, is void; and a ſubſequent marriage is not a part execution of ſuch an agreement to take it out of the ſtatute. But a ſubſequent marriage and *ſettlement* has been held ſufficient to prevent the ſtatute operating upon ſuch parol promiſe. (*h*)

Letters from parents, or perſons in *loco parentis*, containing promiſes of proviſions, have been a frequent ſubject of adjudication, and wherever they have been explicit in their terms, and the ſubject matter of the promiſe has been reduced to ſufficient certainty, they have been held to ſatisfy the ſtatute. Thus, in a caſe determined a very few years after the ſtatute was paſſed, where a father wrote a letter, ſignifying his aſſent to the marriage of his daughter with J. S. and that he would give her 1500*l.*, and afterwards, by another letter, upon a further treaty concerning the ſaid marriage, went back from the propoſals of his firſt letter; and again, at ſome time after, declared that he would agree to what was propoſed in his firſt letter; the letter was held a ſufficient promiſe in writing, within the ſtatute of frauds, and that the laſt declaration had ſet up the terms of the firſt letter again. (*i*)

But, in the caſe of *Ayliffe* v. *Tracy* (*k*) where it is ſtated that the plaintiff courted one of the daughters of Sir *Thomas Haſlewood*,

(*f*) Stra. 34. (*g*) This muſt be intended for 3 Lev. 65. the caſe in 3 Lev. 411. being upon marriage brocage bonds, and not at all relating to the ſtatute of frauds.

(*h*) *Montacute* v. *Maxwell*, 1 P. Wms. 618. Stra. 236. S. C. See alſo 1 Vez jun. 199. 4 Eaſt. 201.

(*i*) Vide 2 Vent. 361. Prec. Chan. 560. 2 Vern. 200. 202.

(*k*) 2 P. Wms. 65. This caſe is very differently ſtated in 9 Mod. 3.

and

and treated with the father about the marriage; the father conſented to the marriage, and wrote a letter to his daughter, intimating that he had met the plaintiff Mr. *Ayliffe*, and had agreed to give him as a portion 3000*l.* which the plaintiff (he ſaid) ſeemed fully to aſſent to, and that they were to meet the next day, when the affair was to be fully concluded; and he ſubſcribed his name to the letter.

Accordingly they met, and agreed to the marriage, and the father gave money to the daughter to buy her wedding-cloaths, and the wedding-day having been appointed, the father died before that day, having made his will long before this treaty of marriage, and given his daughter only 2000*l.*

The daughter did not ſhow this letter to the plaintiff, her intended huſband, whom ſhe afterwards married, and the 2000*l.* legacy was paid to the plaintiff, the huſband; but he did not, neither was he required to make any ſettlement on his wife, but was a merchant and freeman of *London*.

The Lord Chancellor (*l*) ſaid, "This being no more than a communication, has no ingredient of equity; the huſband made no ſettlement; he did not know of this letter, it being wrote to the daughter, and therefore cannot be ſuppoſed to have married in conſequence of the letter."

Then he accepted of the 2000*l.* legacy as the portion, and at that time demanded no more, and the other daughter had but 1500*l.* portion."

But, where A. by letter promiſes to give ſuch a fortune with his daughter to B., and B. marries the daughter on the encouragement of this letter; this is ſufficient to bring the agreement out of the ſtatute of frauds; and B. ſhall recover, becauſe the agreement is executed on his part as far as it can be, and can never be undone after. (*m*)

(*l*) *Macclesfield.*

(*m*) 2 Eq. Caſ. abr. 49. See alſo 2 Vern. 322. 1 Vez. 297.

4. *Of a Contract or Sale of Lands, &c.*

In another branch of the fourth ſection of the ſtatute, it is enacted, "that no action ſhall be brought to charge any perſon upon any contract or ſale of lands, tenements, or hereditaments, or any intereſt in or concerning them, unleſs the agreement upon which ſuch action ſhall be brought, or ſome *memorandum* or note thereof, ſhall be in writing, and ſigned by the party to be charged therewith, or ſome other perſon thereunto by him lawfully authorized.

Upon this part of the ſtatute it is ſaid, (*n*) that *Treby*, Ch. J. reported to the other juſtices of the *Common Pleas*, that it was a queſtion before him at a trial at *niſi prius*, at *Guildhall*, *whether the ſale of timber growing upon the land* ought to be in writing by the ſtatute of frauds, or might be by *parol?* And he was of opinion, and gave the rule accordingly, that it might be by parol, becauſe it is but a bare chattel. And to this opinion *Powell* Juſtice agreed.

So, in the caſe of *Poulter* v. *Killingbeck*, (*o*) which was an action of *indebitatus aſſumpſit*. The firſt count of the declaration was "for 20*l.* for the moieties of divers crops of wheat, and cole-ſeed, by the plaintiff before that time ſold to the defendant, and by the defendant, in conſequence of ſuch ſale before then had, reaped and taken to and for his own uſe and benefit." The ſecond count was on a *quantum meruit*, "for that the plaintiff had permitted and ſuffered the defendant to depaſture, eat up, and conſume with his cattle the moiety of a certain other crop of cole-ſeed." There was alſo a count for money had and received.

The cauſe was tried before *Aſhhurſt*, juſtice, and it appeared that the plaintiff being poſſeſſed of certain pieces of fen-land, which he was deſirous of having put into a ſtate of cultivation, made a verbal declaration to let them to the defendant without rent, who was to plough, dreſs, and ſow them for two ſucceſſive crops, and in lieu of rent, to allow the plaintiff a moiety of the crops. While the crops of the ſecond year were on the ground, an appraiſe-

(*n*) Lord Raym. 182. (*o*) 1 Boſ. and Pul. 397.

ment

ment of them was taken for both parties, and the value aſcertained. The defendant having afterwards refuſed to pay a moiety of the value, this action was brought. It was contended, at the trial, that a ſpecial agreement for a moiety of the crops having been proved, this action of *indebitatus aſſumpſit*, for a moiety of the value, could not be ſupported: and alſo that the agreement itſelf was within the ſtatute of frauds; firſt, becauſe it related to land; and ſecondly, becauſe it was not to be executed within a year; and that it ought therefore to have been in writing. A verdict was found for the plaintiff ſubject to the opinion of the court on the firſt objection.

Eyre, Ch. J. ſaid: "The circumſtance of the appraiſement ſeems to put an end to this point: It is true that as the caſe originally ſtood, the plaintiff had a claim to a moiety of the produce of the land under a ſpecial agreement: but that ſpecial agreement was executed by the appraiſement. It had been agreed that the moiety of the crops was the property of the plaintiff; but he being willing that the defendant ſhould keep them, a ſurveyor was appointed to ſettle the price between them. The circumſtance of the appraiſement affords clear proof that the plaintiff ſold what the defendant had agreed was his: and the price being aſcertained, brings this to the caſe of an action for goods ſold and delivered. It is unneceſſary to ſtate a ſpecial agreement, which has been executed, where the action ariſes out of ſomething collateral to it."

Buller J. "If no appraiſement had taken place, the objection to the action in this form muſt have prevailed. But that circumſtance is deciſive. With reſpect to the point made at the trial, on the ſtatute of frauds, this agreement does not relate to any intereſt in the land, which remains altogether unaltered by the arrangement concerning the crops."

But a contract with the owner of a cloſe for the purchaſe of a growing crop of graſs to be mown and made into hay by the vendee, if not in writing, is within the ſtatute.

Thus, in the caſe of *Croſby* v. *Wadſworth*, (*p*) which was an action of *treſpaſs*. At the trial a verdict was found for the plaintiff,

(*p*) 6 East, 602. See alſo *Waddington* v. *Briſtow*, 2 Bos. and Pul. 452. *et vide poſt*, chap. V. where it was held, that a ſale of hops not gathered, is not within the exception of the ſtatute relating to agreements for the ſale of any *goods, wares, and merchandize*.

ſubject to the opinion of the court on the following caſe. The declaration ſtated, that the defendant on the 9th of *July* 1804, and on divers other days, &c. with force and arms broke and entered a certain cloſe whereof the ſaid plaintiff was then lawfully poſſeſſed, and cut down the plaintiff's graſs, then growing in the ſaid cloſe, and alſo took and carried away the ſame, and alſo the plaintiff's hay then being on the ſaid cloſe, and diſpoſed thereof to his own uſe. The facts were that on the 6th of *June* 1804 the plaintiff agreed by *parol*, with the defendant for the purchaſe of a ſtanding crop of mowing graſs, then growing in a cloſe of the defendant's, for 20 guineas. The graſs was to be mowed and made into hay by the plaintiff; but the parties did not abſolutely fix upon any time at which the mowing was to be begun. No earneſt was given, nor, was any note, memorandum, or writing, ſigned by either of the parties or by any perſon on their behalf, nor was poſſeſſion of the cloſe given to the plaintiff, but was retained by the defendant. On the 2d of *July* the defendant told the plaintiff he ſhould not have the graſs; and afterwards on that day, ſold it to *W. Carver* for 25 guineas. The plaintiff on the 12th of *July* tendered to the defendant 20 guineas for the crop, which the defendant refuſed to accept. The plaintiff went next morning to the defendant's cloſe, and finding the gate unlocked, ſent in a perſon to mow the graſs, who cut near half of the cloſe. On the evening of the 15th the defendant brought a letter from his attorney to the plaintiff, forbidding him to enter the cloſe, and diſcharging him from mowing the graſs. A lock was then fixed upon the gate by the defendant, and *Carver*, by his directions, carried away the graſs which had been mowed, and afterwards cut and carried away the remainder of the crop. The queſtion for the opinion of the court was, whether the plaintiff were entitled to recover.

After the caſe had been fully argued, and the court had taken time to conſider it, Lord *Ellenborough* Ch. J. delivered the opinion of the court as follows:

"As the plaintiff appears to have been entitled (if entitled at all under the agreement ſtated) to the excluſive enjoyment of the crop growing on the land during the proper period of its full growth, and until it was cut and carried away, he might in reſpect of ſuch excluſive right maintain treſpaſs againſt any perſons doing the acts complained of in violation thereof. This brings us to

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the queſtion, whether the plaintiff had under the agreement and circumſtances ſtated any legal title to this growing crop at the time when the injury complained of was done; or whether his ſuppoſed title thereto was not wholly void; as being created by *parol*, under any, and which of the proviſions in the ſtatute of frauds, or on any, and what other account? And in the outſet I feel myſelf warranted in laying wholly out of the caſe the proviſion contained in the 17th ſection of this ſtatute as not applicable to the ſubject matter of this agreement, which cannot be conſidered in any proper ſenſe of the words as a ſale of *goods, wares, or merchandizes*; the crop being at the time of the bargain, (and with reference to which time I agree with Mr. Juſtice *Heath* in *Waddington* and *Briſtow*; 2 Bos. and Pull. 452, that the ſubject matter muſt be taken,) an unſevered portion of the freehold, and not moveable goods or perſonal chattels. The next queſtion then is, is it a "leaſe, eſtate, intereſt, of freehold or term of years, or an un-"certain intereſt of, in, to, or out of lands, created by parol," within the meaning of the firſt ſection, ſo as to be void as *not having been put in writing?* I think, collecting the meaning of the firſt by aid derived from the language and terms of the ſecond ſection, "and the exception therein contained, that the *leaſes*, "&c. meant to be vacated by the 1ſt ſection muſt be underſtood "as *leaſes* of the *like* kind with thoſe in the 2d ſection," but which conveyed a *larger intereſt* to the party than *for a term of three years*, and ſuch alſo as were made *under a rent reſerved thereupon*; neither of which circumſtances are to be found in this agreement for the growing crop. Suppoſing it, therefore, on this conſtruction of the ſtatute, not vacated as a leaſe, &c. under the 1ſt ſection, it then comes to be conſidered under the 4th ſection of the act, whether this purchaſe of the growing crop be "a "contract or ſale of lands, tenements, or hereditaments, or "any intereſt in or concerning them?" and if it be ſo, then whether this action of treſpaſs be "an action brought to charge "the defendant on ſuch contract or ſale," within the meaning of the ſtatute? Upon the firſt of theſe queſtions, I think that the agreement ſtated, conferring, as it profeſſes to do, an excluſive right to the veſture of the land during a limited time and for given purpoſes, is a contract or ſale of *an intereſt in*, or at leaſt, an intereſt *concerning lands*. But the ſtatute does not expreſsly and immediately vacate ſuch contracts, if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting

contracting party or his repreſentatives, on the ground of ſuch contract and of ſome ſuppoſed breach thereof; which deſcription of action does not properly apply to the one brought, *viz.* a mere general action of treſpaſs, complaining of an injury to the poſſeſſion of the plaintiff, however acquired, by contract or otherwiſe. But although the contract for this *intereſt in* or *concerning land* may not be in itſelf wholly void under the ſtatute, merely on account of its being by parol; ſo that if the ſame had been executed the parties could have treated it as a nullity; yet, being executory, and as for the non-performance of it no action could have been by the proviſions of the 4th ſection maintained, we think it might be diſcharged before any thing was done under it which could amount to a part execution of it. And this diſcharge, unfortunately for the plaintiff, appears to have been given in the preſent inſtance, on the 2d *July*, by the countermand and refuſal of the defendant of that date, before the plaintiff had done any one act towards carrying the agreement into effect. On this latter ground therefore, *viz.* that this parol executory contract, ſuppoſing it to have been otherwiſe valid, was competently diſcharged by parol, we feel ourſelves obliged to ſay that the plaintiff is not entitled to recover. The caſe ſuggeſted at the cloſe of the argument of *Poulter* v. *Killingbeck*, (*p*) has no material application in favour of the plaintiff. It was there objected that the agreement was within the ſtatute of frauds, *firſt*, as relating to land; *ſecondly*, as not being to be executed within a year. As to the firſt objection, the contract, if it had originally concerned an intereſt in land, after the agreed ſubſtitution of pecuniary value for ſpecific produce no longer did ſo; it was originally an agreement to render what ſhould have become a chattel, *i. e.* part of a ſevered crop in that ſhape, in lieu of rent, and by a ſubſequent agreement it was changed to money inſtead of remaining a ſpecific render of produce. So that one wonders rather how it ſhould ever have been thought an intereſt in land, than that it ſhould have been decided not to be ſo. The ſubſequent agreement relieved the caſe alſo from the ſecond objection."

All *freehold rents*, of whatever denomination, are within the operation of this clauſe, as coming under the word *tenements*. (*q*)

(*p*) Ante, 75. (*q*) Vide 2 Vez. jun. 232. See alſo *Roberts on the Statute of Frauds*, 126, 7.

So,

So, alſo a *ſhare of the New River water* comes under the deſcription of "*land* or *tenements*." (*r*)

It is obſerved, (*s*) "that the word *tenements*," has in law ſo extenſive an import, that it may be queſtioned whether the ſuperadded words in this clauſe of the ſtatute has enlarged the operation of the ſtatute. It was the only word which the ſtatute of *Weſtminſter*, 2, or 13. Ed. 1, Cap. 1. *de donis conditionalibus*, uſed in expreſſing the ſubjects of its proviſions. And Lord *Coke*, in ſpeaking of the ſtatute *de donis*, obſerves that the word tenement, therein includes not only all corporate inheritances, which are, or may be *holden*, but alſo all inheritances iſſuing out of any of thoſe inheritances, or concerning, or annexed to, or exerciſable within the ſame, though they lie not in tenure; as rents, eſtovers, commons, or other profits whatſoever, granted out of lands, or uſes, offices, or dignities, which concern lands, or certain places, and theſe may all be entailed within the ſtatute, becauſe they ſavour of the reality. Such things too whereof a wife is dowable, as the profits of a ſtallage, market, or fair, a dove-houſe, or piſcary, which have no connection with the ſoil, as alſo a preſentation to an advowſon, tithes, the profits of courts, fines, and heriots, ſeem all to be included within the compaſs of this clauſe of the ſtatute.

But all equitable liens on land are out of the ſtatute.

Thus, in the caſe of *Ruſſell* v. *Ruſſell*, (*t*) where a leaſe had been pledged by a perſon who afterwards became a bankrupt, to the plaintiff, as a ſecurity for a ſum of money borrowed; and the holder brought his bill for the ſale of the leaſehold eſtate, though it was inſiſted by the defendant's counſel, that the plaintiff's claim was oppoſed by the 4th ſection of the ſtatute of frauds, as an attempt to charge lands without writing, yet an iſſue was directed by the Lords Commiſſioners, to try with what intention the leaſe had been delivered; and Lord *Loughborough* ſeemed to treat the contract as already executed in equitable contemplation, and not as a thing *to be* performed, obſerving that the court had nothing to do but to ſupply the legal formalities. Upon the trial, the jury found that the leaſe was depoſited as a ſecurity; and the cauſe afterwards

(*r*) 2 P Wms. 127. (*s*) *Roberts on the Statute of Frauds*, 127.
(*t*) 1 Bro. Ch. Rep. 269. See alſo *Roberts on the Statute of Frauds*. 128.

coming

coming on upon the equity reſerved before Lord *Thurlow*, Chancellor, the court ordered the leaſe to be ſold, and the plaintiff to be paid his money.

Upon this branch of the ſtatute it has alſo been determined, that though the agreement be not in writing, yet if there has been a part-performance of the contract, this circumſtance takes the caſe out of the ſtatute. But the part-performance muſt be ſuch an act, as would not have been done but on account of the agreement, or unleſs the party had not conſidered himſelf, or been treated as owner. The part-performance muſt alſo appear to be acts done with a direct view to perform the agreement; and they muſt be ſuch as are prejudicial to the party performing them.

Thus, in the Earl of *Aylesford*'s caſe, (*u*) there was a parol agreement for a leaſe of twenty-one years, upon which the leſſee entered, and continued in poſſeſſion for ſix years, and then the Earl brought a bill againſt him, to oblige him to execute a counterpart for the reſidue of the term. The leſſee pleaded the ſtatute of frauds and perjuries, which, on argument, was over-ruled, the agreement being in part carried into execution.

So, in *Pyke* v. *Williams*, (*v*) where poſſeſſion of an eſtate having been delivered by the ſeller to the purchaſer, who refuſed to complete his purchaſe, and to give a colour to his poſſeſſion, procured an aſſignment of a mortgage which he antedated; the poſſeſſion delivered, was held to be an act of part-performance; and accordingly the Lord *Keeper* decreed *Pyke* to go on with his purchaſe.

So, payment of part of the purchaſe money has been holden to be ſuch a part-performance, as to take a caſe out of the ſtatute.

Thus, in *Lacon* v. *Mertins*, (*w*) it was diſtinctly laid down by Lord *Hardwicke* that payment of money had been always held in a court of equity as a part-performance.

(*u*) Stra. 783.

(*v*) 2 Vern. 455. See alſo *Lockey* v. *Lockey*. Prec. in Chan. 519. *Seagood* v. *Meale*, ib. 561. S. P. See alſo *Buckmaſter* v. *Harrop*, 7 Ves. jun. 341. *Willis* v. *Stradling*, 3 Ves. jun. 378.

(*w*) 3 Atk. 4. 1 Ves. 82. See alſo *Hollis* v. *Whiting*, 1 Vern. 151. and *Dean* v. *Bard*, and *Hollis* v. *Edwards*, 1 Vern. 159. as to laying out Money in Repairs, &c.

There is, however, a case which has a contrary tendency: Thus, (*x*) where A. agreed with B. to make him a lease for 21 years, rendering rent, and B. paying to A. 150*l.* fine. B. paid 100*l.* in part to A.'s agent, with the privity of A., who thereupon ordered his agent to prepare a lease, but before it was executed, he repented and refused. B. exhibited his bill for a specific performance, but the court refused.

But, in the case of *Main* v. *Melbourn*, (*y*) Lord *Loughborough* considered that case as ill determined. And his lordship there made this distinction, *viz.* that payment of a *substantial part of the purchase-money* will take an agreement, as to land, out of the statute on the ground of part-performance; but payment of a small part, whether upon the notion of binding the bargain, or on account of the purchase-money, is not sufficient.*

The case of *Main* v. *Melbourn* was as follows: The bill stated, that under an act of parliament for inclosing certain lands in the county of *Lincoln*, part of the premises were on the 2d of *April* 1793 alloted to the defendant in respect of a right of common to which he was entitled. The plaintiff on or about the 2d of *April* treated with the defendant for the purchase of his allotment for the sum of 105*l.*; and the plaintiff agreed to purchase the same of him at that price; and thereupon paid to the said defendant the sum of 5*l.* 5*s.* in part of the said sum of 105*l.*

The bill charged these facts; and that *William Stanger*, a neighbour of the defendant, in whose presence the money was paid, before the defendant agreed to sell the said allotment to the plaintiff, described to the defendant where it lay; and the defendant, upon receiving such information from *Stanger*, agreed to sell the said allotment to the plaintiff, and accepted the said sum of 5*l.* 5*s.* in part of the said purchase-money of 105*l.*; also, that

(*x*) 2 Eq. Cas. Abr 46. (*y*) 4 Ves. jun. 720.

* This point, however, is by no means settled, for in the late case of *Coles* v. *Trecothick*, 9 Ves. jun. 234 it was ~~considered as doubtful~~; and in the case of *Clinan* v. *Cooke*, 1 Schoales and Lefroy's Rep. 22. Lord *Redesdale*, Chancellor, is reported to have said, "That it had "always been considered that the payment of money is not to be "deemed a part-performance, to take a case out of the statute." But see Roberts on the Statute of Frauds, 153. and Sugden's Law of Vendors, &c 74 to 81 2 ed.

the

the defendant had endeavoured to prevail upon the plaintiff to receive back the ſaid ſum of *5l. 5s.*

The bill, which was filed upon the 18th of *March* 1793, prayed a ſpecific performance of the agreement. The plea of the ſtatute of frauds was put in in *December* 1793; and from that time no ſtep was taken till *July* 1799; when the plea was ſet down to be argued.

Lord *Loughborough*, Chancellor, ſaid, "It is not diſputed, that if part of the purchaſe-money ſubſtantially is paid, that takes it out of the ſtatute. But it is contended, that five guineas are not enough upon the notion of binding the bargain. I take it for granted, that five guineas were paid at the time; whether upon notion of binding the bargain or on account of the purchaſe-money, they are certainly part of the 100 guineas: But ſo ſmall a part that it does not indicate any intention to bind the bargain. If half a-crown was paid, it cannot be denied that it was part of the 100 guineas. I cannot let the plaintiff put his own conſtruction upon the payment. I muſt conſtrue the nature of it; whether it was on the account of the purchaſe-money or upon the notion of binding the bargain. By the plea the defendant admits the fact, as far as it is well ſtated by the bill. The bill ſtates, that five guineas were paid; and avers that they were paid as part of the purchaſe-money. It does not ſtrike me, that that was the nature of the tranſaction between the parties. The bill would have ſtated it the ſame way, if five ſhillings had been paid. There is ſomething alſo in your not having ſet down this plea. You file a bill for a ſpecific performance; and when the defendant has pleaded, you ſtop ſhort upon it. What buſineſs has the defendant to go farther? It is hanging up a perſon upon a purchaſe."

But if real eſtates are put up to public ſale, payment of the auction-duty is no circumſtance of part-performance. So, where the application to enforce a contract is made by the vendor, he cannot ſet up the circumſtance of the vendee's paying part of the purchaſe-money as a part-performance. He muſt ſhow ſome act done by which he himſelf is prejudiced.

Thus, in the caſe of *Buckmaſter* v. *Harrop*, (z) the facts were theſe: On the 23d of *July* 1800 certain eſtates were ſold in four lots by diſtinct particulars; and two agents for *Peter Davenport Finney* were declared the beſt bidders, at ſeveral ſums, amounting

(z) 7 Ves. jun. 341, *Coram* Sir Wm. *Grant*, Maſter of the Rolls.

to 3,119*l.*; and they immediately after the sale, declared, that they purchased for *Finney*; and *Finney* offered to pay the deposits, 10 *per cent*, and the auction-duty, to *Strethill Wright*, the auctioneer, who was also the vendor: but he declined receiving either, alleging, that it was then late at night, and he had to go eight miles: but he told *Finney*, he would lay down the ~~money~~ duty; and would settle the same with him some other time, which *Finney* agreed to; and accordingly *Wright* paid the auction-duty, amounting to 77*l.* 19*s.* 6*d.* By the conditions of sale the purchaser was to have possession of lot 3 immediately, and of the other lots at *Michaelmas* next; paying the remainder of his purchase-money upon the execution of the conveyance on or before the 29th of *September*. *Finney* soon afterwards gave the amount of the auction-duty to his attornies, to be paid to *Wright*, directing them to take a proper receipt. He also sold the crops of hay, grass, and oats, then growing on the premises comprised in lot 3. for 50*l.* to a person, who afterwards took possession of the premises in that lot. *Finney* died before the 50*l.* or any rent became due. An abstract of the title was sent to the attornies of *Finney* about the 15th of *September*, who approved the title; but, before any conveyance, on 22d of *September*, *Finney* died.

The bill was filed by the heirs at law of *Finney* against the executors, the residuary legatee, and *Wright*; praying a specific performance of the contract; and that the purchase-money might be paid out of the personal estate.

The Master of the Rolls said: "The question must be the same, whether a purchase, or a sale is insisted on: Was the ancestor himself bound? Was there such an agreement as converts the *real* estate into *personal*, or the *personal* estate into *real*? I am of opinion, every objection may be taken upon either, which it would have been competent to the deceased to take, if he had resisted the execution in his life. The plaintiffs say, if it is necessary, and I am of opinion it is, they can show there was such an agreement. First, they say, either a sale by auction, is not within the statute of frauds; or, the auctioneer putting down the name of the vendee is an agreement in writing; and they cite *Simon* v. *Metivier* (*a*). But whatever is the authority of that case, it has been held not to extend to land. It was twice so ruled by Lord Chief Justice *Eyre*.

(*a*) Bul. N. P. 280. 3 Bur. 1921. *Et post.* 117.

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In *Walker* v. *Conſtable*, and *Stansfield* v. *Johnſon*, (*b*) it was held not ſufficient that the agent wrote down the name.

The plaintiffs then contended, that the agreement is part-performed as to all the lots; and, if not as to all, as to lot No. 3. I am of opinion this is no part-performance. The revenue laws ought never to be held to operate beyond their direct and immediate purpoſe, to affect the property, and vary the rights of the parties, not within the intention of the act. Upon a ſale by auction ſo much is paid to the vendor as part-payment; and ſo much to the government, as tax. If the purchaſer refuſes to pay the tax, his bidding is void. If he pays it, the only conſequence is, his bidding has the ſame effect, as it would have had, if no ſuch law had been made, and no other. That, without which there would have been no contract, cannot be ſaid to be in part-performance of the contract. The only contract with the vendor, and which I can enforce is, for the price. But, ſuppoſe payment of the auction-duty could be conſidered part of the price, I do not ſee how that could bind the purchaſer. In general, the the party ſeeking the performance muſt ſhew a performance on his ſide; as a reaſon for the interference of the court in his favour; for the ground upon which the court acts is fraud in refuſing to perform after performance by the other party. The inquiry is, whether *Finney*, if ſo diſpoſed, could have reſiſted the performance; for, if he could, upon the principle I before ſtated, the heir is not entitled to call for an application of the perſonal eſtate for this purpoſe. Now, his refuſal, after paying part of his purchaſe-money, would be no fraud upon the ſeller, but his own loſs; in this caſe, the loſs of the perſonal eſtate. *Wright* having advanced the duty, is entitled to call upon the executors. In *Lacon* v. *Mertins*, the act of part-performance was payment of a conſiderable part of the purchaſe-money; and the taking notes was only as a ſecurity, in caſe it ſhould not proceed; and it was held, that, notwithſtanding that, it was part-performance; and therefore it was a fraud to refuſe performance on the other ſide.

Another act of part-performance was inſiſted upon here: the circumſtance ſtated by the witneſs *Barlow* relative to lot 3. If this were held to be an act of part-performance, it could not affect any other lot; for the ſeveral lots were included in diſtinct articles of ſale; and ſo were unconnected. But even as to this lot I am of opinion,

(*b*) *Vide poſt.*

opinion, it is not a part-performance. The bargain with *Barlow* was the mere act of the vendee. The vendor had no prejudice. He had done nothing to entitle him to say, the non-execution was a fraud upon him. If he had let *Barlow* into poſſeſſion, that would be an act by which he might have had a prejudice. All *Barlow* says is, he is now in poſſeſſion; which cannot be taken to be before *Finney*'s death; and nothing that paſſed ſince, could influence the queſtion: the inquiry being, whether at his death he could have been compelled to perform the agreement. I am aware there are caſes that acts done by the defendant can be made a ground for compelling him to perform the agreement: but it is difficult to bring thoſe caſes to bear; for, to what do ſuch acts amount when there is no prejudice to the plaintiff? Only to proof of the exiſtence of an agreement. The exiſtence of the agreement may be put out of all doubt by the acts: but the objection upon the ſtatute, that the agreement is not in writing, remains where it did. The court does not profeſs to execute a parol agreement merely, becauſe it is ſatisfactorily proved. In *Whaley* v. *Bagenal*, which being before the Houſe of Lords, muſt ſuperſede the authority of every other caſe, various acts had been done, which implied that the party had ſold the eſtate, and did not conſider himſelf any longer the owner of it. The queſtion ſtill remained, whether that agreement ſhould be carried into execution; and it was held, that the acts done by the defendant did not entitle the plaintiff to have it ſpecifically performed.

Upon the whole the plaintiffs are not entitled to this relief."

In the caſe of *Whaley & Bagnel* or *Bagenal*, (*a*) the application was for a ſpecific execution of the contract; and was made on behalf of the party by whom the acts of part-performance were not done againſt the party performing them. The caſe, in ſubſtance, was as follows: A. agreed by parol with B. for the purchaſe of lands. B. delivered a rent-roll, which was dated and altered in his own hand writing, and ſhowed by the title of it, that an agreement had been made between them for the ſale of the eſtate at twenty-one years purchaſe. An abſtract of the title was alſo delivered to A. together with the deeds, in order to be compared with the rent-roll. B. likewiſe wrote letters to ſeveral of his creditors, informing them that he had contracted with A. for the ſale of his eſtate, at twenty-one years purchaſe, and ſent the tenants to treat with A. for a renewal of their leaſes. B., however, refuſed

(*a*) 1 Bro. P. C. 345. See alſo *Cooke* v. *Tombs*, 2 Anſtr. 420. S. P.

to

to complete the purchaſe. A. thereupon filed a bill in the Court of Chancery in *Ireland*, for a ſpecific execution of the agreement; to which B. pleaded the ſtatute of frauds in bar; and the plea was allowed by order of the *Chancellor*; and which order, upon appeal, was affirmed by the Houſe of Lords.

For more concerning the ſale of lands *vide poſt.* 109.

5. *Of Agreements not to be performed within a Year, &c.*

By the laſt branch of the 4th clauſe of the ſtatute it is enacted "That no action ſhall be brought to charge any perſon upon any agreement that is not to be performed within the ſpace of one year from the making thereof, unleſs the agreement upon which ſuch action ſhall be brought, or ſome *memorandum* or note thereof, ſhall be in writing, and ſigned by the party to be charged therewith, or ſome other perſon thereunto by him lawfully authorized."

Upon this part of the ſtatute it has been holden, that if no time be ſtipulated for the performance of the agreement, and it is capable of being performed within a year from the making thereof, it is not within the ſtatute, though it be not actually performed till after that period.

Thus, (*b*) where a *parol* promiſe was made to pay ſo much money upon the return of ſuch a ſhip, which ſhip happened not to return within two years time after the promiſe made: It was made a queſtion before all the judges whether this promiſe was void by the ſtatute of frauds. They were of opinion that it was a good promiſe, and not within the fourth clauſe of the ſtatute, for that by poſſibility the ſhip might have returned within a year; and though by accident it happened not to have returned ſo ſoon, yet, they ſaid, that clauſe of the ſtatute extends only to ſuch promiſes, where, by the expreſs appointment of the party, the thing is not to be performed within a year.

So, in the caſe of *Peter* v. *Compton*, (*c*) which was an action upon a *parol* agreement, by which the defendant promiſed, in con-

(*b*) *Anonymous* Caſe, 1 Salk. 280.
(*c*) Skin. 353. Holt. 326. S. C. See alſo Comb. 463. Skin. 326. S. P.

ſideration of one guinea, to give the plaintiff ſo many on the day of his marriage.—And the queſtion upon the trial, before *Holt*, Ch. J., was, whether ſuch agreement ought to be in writing, for the marriage did not happen within a year: the Chief Juſtice adviſed with all the judges, and by the great opinion (for there was a diverſity of opinion, and his own was ê contra) where the agreement is to be performed upon a contingent, and it does not appear in the agreement, that it is to be performed after the year, there a note in writing is not neceſſary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is neceſſary; otherwiſe not.

So, in the caſe of *Fenton* v. *Emblers*, executor of *May*, (*d*) where the promiſe was ſtated in the declaration thus: "that *William May*, the defendant's teſtator, in conſideration that the ſaid *Sarah* (the plaintiff) would be and become the houſekeeper and ſervant of the ſaid *William*, and take upon herſelf the care and management of his family, &c., and perform the ſame as long as it ſhould pleaſe the ſaid *William*, and *Sarah*, undertook and promiſed to pay wages to the ſaid *Sarah*, at and after the rate of 6*l.* for one year; and alſo by his laſt will and teſtament, to *give and bequeath* to the ſaid *Sarah* a legacy or annuity of 16*l.* by the year, to be paid to her yearly, &c.; and that the ſaid *Sarah*, confiding in the ſaid promiſe, entered into the ſaid teſtator's ſervice, and became his houſekeeper, &c. and continued ſo for three years and 59 days; but that the ſaid *William* had not performed his ſaid agreement, and did not leave her ſuch legacy or annuity, &c." And it appeared upon the evidence that there was ſuch an agreement between the ſaid *William May*, and the plaintiff, but that it was by *parol*, and not in writing. It appeared alſo, that the plaintiff did enter into the teſtator's ſervice, and continued in ſuch ſervice till his deceaſe; but that the teſtator did not give her by his laſt will or otherwiſe, the ſaid annuity of 16*l. per annum*, or any other annuity. An objection was taken upon the fourth ſection of the ſtatute of frauds, that the agreement was not to be performed within the year. And it was ſaid, that it would be extremely inconvenient to eſtabliſh promiſes of this kind, not reduced to writing; that the agreement could not be performed on *May*'s part within a year, for a whole year from his death was

(*d*) 3 Bur. 1278. 1 Bl. Rep. 353. S. C.

to

to elapſe before the annuity, or any part of it, was to become payable: but it was anſwered on the other ſide, that the action was brought for *May's* not having done what he ought to have done in his lifetime, ſo that it *might* have been done within the year. And Mr. J. *Denniſon* declared his opinion to be, in which opinion the other judges fully coincided, "that the ſtatute of frauds plainly means an agreement not to be performed within the ſpace of a year, and expreſsly and ſpecifically ſo agreed. That a contingency was not within it; nor any caſe that depended upon a contingency; and that it did not extend to caſes where the thing only might be performed within the year."

6. *Of Contracts for the Sale of Goods.*

By the 17th ſection of the ſtatute of frauds it is enacted, "that no contract for the ſale of any goods, wares, and merchandizes, for the price of 10*l.* ſterling, or upwards, ſhall be allowed to be good, except the buyer ſhall accept part of the goods ſo ſold, and actually receive the ſame, or give ſomething in earneſt to bind the bargain, or in part of payment, or that ſome note or *memorandum* in writing of the ſaid bargain be made and ſigned by the parties to be charged by ſuch contract, or their agents thereunto lawfully anthorized."

Upon this clauſe of the ſtatute it has frequently been made a queſtion whether ſhares of a company, or public ſtock, are comprehended under the words *goods*, *wares*, and *merchandizes*. But the point does not appear to have been finally ſettled; for in the caſe of *Pickering* v. *Appleby*, (*e*) which was an action of *aſſumpſit*, for 580*l.* for ten ſhares in the ſtock of the governors and company of the *copper mines* in *England*, transferred and ſold by the plaintiff to the defendant. There was no agreement or memorandum in writing of the contract, or any earneſt paid.

And upon the trial before *King*, Ch. J., it was doubted whether the ſhares in the ſtock of this company were within the purview and intent of the ſtatute of frauds; and therefore it was made a caſe, and argued before the court of *Common Pleas*; and afterwards at *Serjeant's Inn* before all the judges of *England*.

(*e*) Com. Rep. 354.

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The judges, however, being divided in opinion, the queſtion was adjourned. (*f*)

But, in the caſe of *Muſſell* v. *Cooke*, (*g*) where the plaintiff had agreed with one *Green*, the defendant's broker, for 5000*l.* *South-Sea ſtock*, at 187*l. per Cent*, to be delivered about 10 days after; and on the day appointed, the plaintiff attended at the transfer office all day, but the defendant did not come, and the ſtock having in the mean time conſiderably riſen, the defendant refuſed to transfer it; the plea of the ſtatute ſeemed to the Lord Chancellor, *Macclesfield*, to be good. It is obſerved (*) that this laſt mentioned caſe of *Muſſell* v. *Cooke* came on in *Trinity* term 1720, and is probably the caſe alluded to in *Crull* v. *Dodſon*, (*h*) wherein the court ſaid, that it had been determined in Chancery, that bargains relating to ſtock are within the ſtatute of frauds, and if earneſt be not given are *nuda pacta*.

So, in the caſe of *Colt* v. *Netterville*, (*i*) which turned not only upon the queſtion whether ſtock came within the deſcription of *goods*, &c. but alſo upon the circumſtance of ſomething having been given as *earneſt*.

It was a bill for a ſpecific performance of an agreement for transferring ſome *York-Buildings ſtock*, ſtating that the defendant had agreed to transfer it to the plaintiff on a particular day therein mentioned, on the plaintiff's paying the money, and that the plaintiff agreed to pay ſo much *per cent.* and to accept the transfer, and did thereupon pay to the defendant 6*d. earneſt*. To which bill the ſtatute of frauds was pleaded, and the defendant denied that he received or accepted the 6*d. as earneſt*, and alleged that no part of the ſtock was delivered or note given; whereupon it was argued, that the *York-Buildings*, and other ſtocks, were within the words and meaning of the ſtatute of frauds, ſo as to require either part of the thing contracted to be ſold, ~~or~~ to be delivered, or a note in writing, or money to be paid as earneſt; for

(*f*) See 2 P. Wms. 308. where Lord Chancellor *King* ſaid, that the judges were equally divided on this caſe, ſix againſt ſix.
(*g*) Prec. in Ch. 533. * *Roberts on ſtat. of frauds* 185.
(*h*) Select Caſ. in Chan. in Lord King's time, 41. Trin. 11 Geo. 3.
(*i*) 2 P. Wms. 307.

firſt,

firſt, that this clauſe of the ſtatute mentioned expreſsly contracts for the ſale of any goods, or merchandizes, and that the word *goods* was of a very extenſive ſignification. Secondly, that if one having ſtock ſhould commit felony, this without queſtion would be a forfeiture of his ſtock, a forfeiture to thoſe who ſhould have a grant of *bona felonum*, ſo that ſtock was within the words *bona*, or *goods*. Thirdly, at leaſt it was within the word *merchandize*, for every vendible thing was merchandize; now ſtock was a thing vendible, and in the year 1720, was the moſt uſual merchandize which people dealt in.

Fourthly, It could be no objection that at the time of making the ſtatute of frauds there was no ſuch ſtock as *York-Building's* ſtock; for ſuppoſe the ſaid ſtatute, inſtead of being made in King *Charles*'s time, had been enacted in the reign of *Philip* and *Mary*, ſince which time hops came in, and the bargain had been made for hops to the amount of above 10*l.* in money, without writing or earneſt; ſurely ſuch contract had been void; beſides this was moſt plainly within the meaning and miſchief of the ſtatute, which intended to prevent raſh and precipitate bargains for above the value of 10*l.* and to reſtrain ſuch bargains as were of value, to the circumſtances either of paying earneſt, or reducing them to writing.

Fifthly, It was inſiſted that Lord *Cowper* had determined ſuch a contract for ſtock to be within the ſtatute of frauds, and that if it exceeded 10*l.*, the ſame ought to be in writing, in regard ſtocks are goods and merchandizes within that ſtatute.

On the other ſide it was ſaid, that whereas the ſtatute enacts, that no contracts ſhould be good for the ſale of goods, wares, and merchandizes, of 10*l.* price, unleſs part of the goods be delivered, or earneſt paid, or a note in writing, this ſhowed that ſuch goods were intended as were capable of an actual delivery, ſomething that was corporeal, and not ſtock which was incorporeal, nor was there any ſuch thing as *York-Buildings ſtock* at that time.

The Lord *Chancellor* (*k*) ſaid, "This queſtion was before all the judges of *England*, who were equally divided upon it, ſix againſt ſix; and therefore it is a point too difficult for me to determine upon a demurrer." His lordſhip, however, ſaid that ſtock

(*k*) *King*.

did

did not ſeem to be goods, wares, or merchandizes within the intent of the 17th clauſe. But, continued his lordſhip, "This plea is not well pleaded; becauſe the bill ſays, that the plaintiff did pay 6*d.* as earneſt, and the plea only ſays, that the defendant did not *receive or accept* it as earneſt; now it is not material how or in what manner the defendant received or accepted it, but how the other paid it, for *quicquid ſolvitur, ſolvitur ad modum ſolventis*; and ſo is *Pinnel*'s caſe, 5 Co. 117."

So, it was formerly holden, that *executory* contracts (that is where time is given for delivery of the goods) were not within this clauſe of the act; for that it only related to *executed* contracts, or where the goods were to be delivered immediately after the ſale.

Thus, in the caſe of *Towers* v. Sir *John Oſborne*, (*l*) where the defendant beſpoke a chariot, and when it was made refuſed to take it; and in an action for the value, it was objected, that they ſhould prove ſomething given in earneſt, or a note in writing, ſince there was no delivery of any part of the goods. But the Chief Juſtice ruled this not to be a caſe within the ſtatute of frauds, which relates only to contracts for the actual ſale of goods, where the buyer is immediately anſwerable, without time given him by ſpecial agreement, and the ſeller is to deliver the goods immediately.

So, in the caſe of *Clayton* v. *Andrews*, (*m*) the defendant agreed to deliver a certain quantity of wheat to the plaintiff within three weeks, or a month, from the ſaid agreement, at a certain rate, to be paid on delivery; which wheat was underſtood by both parties at the time of making the agreement to be then unthraſhed. No part of the wheat ſo ſold was delivered; nor any memorandum thereof made in writing, nor any earneſt given; and the queſtion for the opinion of the court was, whether this agreement was within the ſtatute of frauds. Lord *Mansfield* held upon the authority of the caſe in *Strange*, (*n*) that it was not within the ſtatute. And Mr. J. *Yates* ſaid, "The 17th clauſe of the ſtatute related only to executed contracts. Here wheat was ſold, to be

(*l*) Stra. 506. at Guildhall, *Coram Pratt*, Ch. J.
(*m*) 4 Bur. 2101. See alſo 1 H. Bl. 20. S. P.
(*n*) *Towers* v. *Oſborne ut ſupra.*

delivered

delivered at a *future* time. It was *unthrashed* at the time when the contract was made; therefore it could not be delivered at that time. To which Mr. J. *Aston* agreed, adding that the case of *Towers* v. *Osborne* had always been considered an authority in point on questions of this kind.

But the distinction taken in these cases between *executory* and *executed* contracts, has been since over-ruled; and it is now settled, that where the goods contracted for are complete and ready for delivery, and existing in *solido*, at the time of the contract, it is within the statute; but that where the goods contracted for are not complete and ready for delivery, but are either to be made, or something is required to be done in order to put them into the state in which they are contracted to be sold, such a contract is out of the statute, and need not be in writing.

Thus, in the case of *Rondeau* v. *Wyatt*, (*o*) which was an action on the case for the non-performance of a special agreement. At the trial, before Lord *Loughborough*, Ch. J. it appeared, that the defendant, who was one of the proprietors of the *Albion Mill*, had entered into a verbal agreement to sell and deliver 3000 sacks of flour to the plaintiff to be put in sacks, which the plaintiff was to send to the mill, and shipped on board vessels to be provided by him in the river, on an express condition that the flour should be exported to foreign parts, from some port which the plaintiff was to open, and should not meet the defendant and the company again in the home market. In order to carry the scheme of exportation into effect, the plaintiff sent down to *Shoreham* in *Sussex* a large quantity of corn and flour merely to reduce, by collusion and a fictitious sale, the market-price to the level prescribed by act of parliament. (*p*) But this intended trick being discovered by government, the exportation was prevented, as the price was then very high, and an apprehension of a scarcity in this country prevailed. As the plaintiff, therefore, could not legally comply with the condition contained in the contract, the defendant refused to deliver the flour. In consequence of this, the plaintiff filed a bill in Chancery against the defendant, praying a specific performance, a discovery of facts, &c. and the names of the partners in the undertaking. In his answers to the bill the de-

(*o*) 2 H. Bl. 63. See also *Cooper* v. *Elston*, *post*, 99. where the determination of this case was fully assented to by all the judges of the Court of *King's Bench*. (*p*) 13 Geo. 3. c. 45. s. 5.

fendant

fendant admitted the agreement, but pleaded the ſtatute of frauds, and averred that there was no note, or memorandum in writing, nor a delivery of any part of the flour to the plaintiff, &c. following the words of the ſtatute. That plea being over-ruled, the preſent action was brought, in which the plaintiff obtained a verdict, contrary to the opinion of Lord *Loughborough*, before whom the cauſe was tried, who thought that on grounds of public policy, but chiefly becauſe the contract ſeemed to him to be within the ſtatute of frauds, the plaintiff was not entitled to recover. A rule was therefore obtained calling upon the plaintiff to ſhew cauſe, why the verdict ſhould not be ſet aſide, and a non-ſuit entered.

And, after the caſe had been fully argued at the bar, and the court had taken time to conſider, Lord *Loughborough* pronounced the judgment of the court to the following effect:

"The only point to be decided, is that which ariſes on the ſtatute of frauds; and we who are now in court, (*p*) think that the objection made on that ſtatute is well grounded, and therefore that the plaintiff ought to be non-ſuited. It was ſaid in the argument, 1ſt. That the ſtatute does not extend to caſes of executory contracts; and 2dly. That it was not applicable, where the agreement which was the ſubject of the action, ſtood confeſſed by the defendant's anſwer to a bill in equity; and that in the preſent caſe, the agreement did appear on the face of the proceedings in Chancery. To try the validity of the firſt objection it will be neceſſary to advert to that clauſe of the ſtatute on which the queſtion ariſes." His lordſhip here read the clauſe, and afterwards obſerved, "Now it is ſingular that an idea could ever prevail that this ſection of the ſtatute was only applicable to caſes where the bargain was immediate, for it ſeems plain from the words made uſe of, that it was meant to regulate executory, as well as other contracts." The words are "No contract for the ſale of any goods, &c." And, indeed, it ſeems that this proviſion of the ſtatute would not be of much uſe, unleſs it were to extend to executory contracts; for it is from bargains to be completed at a future period, that the uncertainty and confuſion will probably ariſe, which the ſtatute was deſigned to prevent. The caſe of *Simon* v. *Mitivier*, (*q*) was decided on the ground, that the auctioneer was the agent as

(*p*) Viz. Lord *Loughborough*, Mr. Juſtice *Gould* and Mr. Juſtice *Heath*. But his lordſhip mentioned a few days before he gave judgment, that Mr. Juſtice *Wilſon*, who was then ſitting in Chancery as one of the Lord's Commiſſioners of the Great Seal, had declared himſelf be of a different opinion.

(*q*) Bul. N. P. 280. 3 Bur. 1921. *et poſt*. 117.

well

well for the defendant as the plaintiff, and therefore that the contract was ſufficiently reduced into writing. The caſe of *Towers* v. Sir *John Oſborne*, (*r*) was plainly out of the ſtatute, not becauſe it was an executory contract, as it has been ſaid, but becauſe it was for work and labour to be done, and materials and other neceſſary things to be found, which is different from a mere contract of ſale, to which ſpecies of contract alone the ſtatute is applicable. In *Clayton* v. *Andrews*, (*s*) which was on an agreement to deliver corn at a fu ure period, there was alſo ſome work to be performed for it was neceſſary that the corn ſhould be thraſhed before the delivery. This perhaps may ſeem to be a very nice diſtinction, but ſtill the work to be performed in thraſhing, made, though in a ſmall degree, a part of the contract. Some of the caſes in the Court of Chancery ſeem to have been founded on the nature of the proceedings in equity, where the court will lay hold of ſome circumſtance of his own admiſſion to compel a party to the performance of his agreement. But the ſame rule is not applicable to courts of law, for if a parol agreement were ſtated in a court of law, and there was a demurrer, which would admit the agreement, yet, ſtill advantage might be taken of the ſtatute. The early caſes in Prec. in Chan. 208. and 374. do not ſeem fairly to admit any other conſtruction than this, namely, that the court thought that, where a parol agreement was admitted by the defendant's anſwer, he might or might not take advantage of the ſtatute at his option. I ſay, the court ſeem to have thought ſo, becauſe in fact no ſuch decree was made in thoſe caſes, which contain merely the extra-judicial opinions of the Lord Keeper, and the *Maſter* of the *Rolls*. It is ſaid in thoſe caſes, and has been adopted in the argument, that when the defendant confeſſes the agreement, there is no danger of perjury, which was the only thing the ſtatute intended to prevent. But this ſeems to be very bad reaſoning, for the calling upon a party to anſwer a parol agreement certainly lays him under a great temptation to commit perjury. But though the preventing perjury was one, it was not the ſole object of the ſtatute: another object was to lay down a clear and poſitive rule to determine when the contract of ſale ſhould be complete. Accordingly the ſtatute has made it neceſſary, that either the party buying ſhould accept and receive part of the goods ſold, or give ſomething in earneſt to bind the bargain, or that there ſhould be ſome note or memorandum in writing ſigned by the parties to the contract. Some-

(*r*) *Ante*, 92. (*s*) *Ante*, 92.

thing therefore direct and ſpecific is to be done, to ſhew that the agreement is complete, that there may be no room for doubt and heſitation. This was the intention of the ſtatute in all contracts of ſale above a certain value, in order to prevent confuſion and uncertainty in the tranſactions of mankind; and we think it wiſe to adhere to that rule. It is not neceſſary in a court of law to inquire into the modes of proceeding by which courts of equity are guided, but it is obſervable, that the caſe of *Whaley* v. *Bagenal* (*t*) in the Houſe of Lords, coincides with the preſent determination of the court.

I now proceed to ſhow what kind of delivery and acceptance will ſatisfy the words of this clauſe when the contract is not in writing.

It is clear, that an actual *delivery* and *acceptance* either of the whole or a part of the goods ſold is ſufficient, where the contract is not reduced into writing. But an *actual* delivery is not in all caſes neceſſary. The thing contracted to be ſold may be *virtually* delivered, and ſuch virtual delivery will be equally effectual to ſuperſede the neceſſity of writing and ſigning. If, therefore, the goods ſold are ponderous, and not capable of actual delivery, and the buyer accepts them, and in virtue of ſuch transfer of the property proceeds to exert a right over them, diſpoſing of them, or giving orders and directions reſpecting them, as the owner thereof, ſuch proceedings may countervail the *actual* delivery, and veſt the property in the buyer, without any written contract or earneſt paid.

Thus, in the caſe of *Searle* and others v. *Keeves*, (*u*) which was an action of *aſſumpſit* for the non-performance of a contract. The declaration ſtated, that in conſideration that the plaintiffs had bought of the defendant 20 barrels of rice at the price of 17*s. per* hundred weight, the defendant undertook to deliver that quantity, and aſſigned the breach in the non-delivery.

The evidence for the plaintiffs in ſupport of this declaration was, that on the 26th of *September* one of the plaintiffs having been at the houſe of the defendant, the defendant told him that he had a quantity of rice to ſell; but there was no evidence to prove any

(*t*) *Ante*, 86. (*u*) 2 Eſp. Rep. 598. See alſo *Hinde* v. *Whitehouſe*, on this point *poſt*, 118.

contract made at that time; the plaintiffs produced an order on *Bennet* and Co. to deliver to them 20 barrels of rice, which was ſigned by *Keeves*; the witneſſes proved that *Keeves* had told them that he had ſold 20 barrels of rice, to Mr. *Searle*, at 17*s. per* hundred; and that he was a fool for ſelling it ſo ſoon, as the price of rice had advanced.

The plaintiffs then proved, the delivery of the order for the rice to the warehouſeman of *Bennet* and Co; and that the rice not being then taken away, *Keeves* on the 2d of *October* countermanded the delivery to *Searle*, the plaintiff, in conſequence of which *Bennet* and Co. refuſed to deliver the rice to *Searle*, who ſent for it on the 10th of *October* following.

The counſel for the defendant contended, that as to this count the plaintiffs ought to be nonſuited; they ſaid that the ſtatute of frauds in all caſes of ſales of goods required a note in writing ſpecifying the terms of the contract, and being meant to guard againſt fraud in contracts, made it neceſſary to ſpecify particularly what the terms of the ſale were: in this caſe there was no ſpecification of the terms, the only evidence was, the order for the delivery by the defendant, which did not ſpecify any thing as to the price, ſo that it was not a ſufficient note in writing under the ſtatute.

Eyre, Ch. J. ſaid: "The ſtatute of frauds does not attach where there has been *earneſt* or a *delivery of part of the things ſold*; I think there has been in this caſe a delivery of the whole. *Keeves*, the defendant, gave an order for the delivery upon *Bennet* and Co. in whoſe poſſeſſion the rice then was; this ſatisfies the ſtatute, and the plaintiffs are entitled to recover."

So, in the caſe of *Chaplin* v. *Rogers*, (*v*) which was an action for goods ſold and delivered; and the caſe proved, was, that the parties being together in the plaintiff's farm-yard, the defendant, after ſome objections and doubts upon the quality of a ſtack of hay (particularly the inſide part) then ſtanding in the yard, agreed to take it at 2*s.* 6*d. per* hundred weight. Soon after he ſent a farmer to look at it, whoſe opinion was unfavourable. But about two months afterwards another farmer of the name of *Left* agreed with the defendant for the purchaſe of ſome of this hay

(*v*) 1 Eaſt, 192.

ſtill ſtanding untouched in the plaintiff's yard, and the defendant told *Loft* to go there and aſk what condition it was in, ſaying he had only agreed for it, if it were good. The plaintiff having informed *Loft* it was in a good ſtate, he agreed to give the defendant 3*s.* 9*d. per cwt.* for it, the defendant having told him that he had agreed to give the plaintiff 3*s.* 6*d.* for it. *Loft* thereupon brought away 36 hundred weight, but this latter fact was without the knowledge and againſt the direction of the defendant. There was a contrariety of evidence as to the quality of the hay when the ſtack was afterwards cut. At the trial, before Baron *Hotham*, it was objected that the contract of ſale was fraudulent and void by the ſtatute of frauds, being for the ſale of a commodity no part of which was delivered, and of which there was no acceptance by the defendant. The learned judge, however, left it to the jury to decide whether the ſale had been fraudulent, and whether under the circumſtances there had been an acceptance by the defendant: and they found for the plaintiff on both points, and gave him 50*l.* damages, being the value of the hay at the price agreed for. A rule *niſi* was obtained calling on the plaintiff to ſhow cauſe why the verdict ſhould not be ſet aſide, and a new trial had, on the grounds that the learned judge had left that as a queſtion of fact to the jury, which he himſelf ought to have decided, as an objection in point of law ariſing on the ſtatute of frauds; and becauſe the evidence did not warrant the verdict.

But the court decided that there was ſufficient evidence of a delivery to, and acceptance by the defendant to leave to the jury; and therefore diſcharged the rule.

Lord *Kenyon*, Ch. J. ſaid: "It is of great conſequence to preſerve unimpaired the ſeveral proviſions of the ſtatute of frauds, which is one of the wiſeſt laws in our ſtatute book. My opinion will not infringe upon it; for here the report ſtates that the queſtion was ſpecifically left to the jury whether or not there were an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any queſtion of law. I do not mean to diſturb the ſettled conſtruction of the ſtatute; that in order to take a contract for the ſale of goods of this value out of it there muſt either be a part delivery of the thing, or a part-payment of the conſideration, or the agreement muſt be reduced to writing in the manner therein ſpecified. But I am not ſatisfied in this caſe that the jury have not done rightly in finding the fact of

of a delivery: Where goods are ponderous, and incapable as here of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property. Now here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another person. Therefore as upon the whole justice has been done, the verdict ought to stand." The rule was accordingly discharged.

But a delivery of a sample, if it be considered as no part of the bulk, is not a part delivery within the meaning of the statute.

Thus, in the case of *Cooper* v. *Elston*, (*w*) which was an action of *assumpsit*, brought to recover the damages sustained by the plaintiff in consequence of the defendant's not delivering 50 quarters of wheat pursuant to his contract with the plaintiff.

At the trial, the jury found a verdict for the plaintiff, damages 50*l.*, subject to the opinion of the Court of *King*'s *Bench* on the following case. The defendant on the 4th of *July* 1795, at *Nottingham*, sold to the plaintiff by sample 50 quarters of wheat at 4 guineas *per* quarter; the wheat to be delivered by the defendant to the plaintiff at *Gainsborough*. Two days afterwards the defendant delivered to the plaintiff at *Nottingham* the sample by which he had sold the wheat to him: but such sample was no part of the 50 quarters to be delivered at *Gainsborough*. No money was paid by the plaintiff to the defendant on account of the wheat; nor was there any memorandum in writing signed by the parties. The defendant afterwards refused to deliver the wheat.

The court were of opinion that this case came within the 17th section of the statute; and therefore judgment was given for the defendant.

Lord *Kenyon*, Ch. J. said: "After this question has been afloat so long in the courts, I am glad that by the very able decision of the Court of Common Pleas, in the case of *Randeau* v. *Wyatt*, (*x*) the construction of this clause of the statute of frauds is brought back to the manifest intention of the legislature in making that provi-

(*w*) 7 Term Rep. 14. See also *Alexander* v. *Comber*, 1 H. Bl. 20 S P.
(*x*) *Ante*, 93.

ſion. To the authority of that caſe I entirely ſubſcribe, and in my opinion it governs the preſent. The doctrine which was laid down in *Clayton* v. *Andrews*, (*y*) as to executory contracts not being within the ſtatute, was taken from *Towers* v. *Oſborne*. (*z*) I will not pretend to ſay that thoſe caſes were not rightly decided upon their particular circumſtances. The latter was a mere contract for work and labour; the thing contracted for did not exiſt at the time. In the former alſo ſomething was required to be done in order to put it in the ſtate in which it was contracted to be ſold. But at any rate I am at a loſs to diſcover how this can be called an executory contract for the ſale of the goods in queſtion. The thing ſold exiſted *in ſolido* at the time of the contract of ſale. I am not able to diſtinguiſh this caſe from that of *Randeau* v. *Wyatt*; and the grounds and principles of that deciſion are ſo amply detailed in the report of it, that it is unneceſſary to add any thing more. With reſpect to this coming within one of the exceptions of the ſtatute on account of the acceptance of the ſample; there is no pretence for it, for the caſe expreſsly ſtates that the ſample was no part of the goods contracted to be delivered."

Groſe, J. "The caſe of *Towers* v. *Oſborne*, went upon the general principle that executory contracts were not within the meaning of the ſtatute. If by that were meant contracts for the ſale of goods to be executed on a future day, ſuch a conſtruction would be a repeal of the act: but if it only meant ſuch contracts as were incapable of being executed at the time, then the deciſion was right; and ſuch was the caſe then in judgment. But in this ſenſe the contract here cannot be ſaid to be executory, for the thing exiſted and was capable of being delivered. It is much to be lamented that the excellent proviſions of the ſtatute of frauds ſhould ever have been infringed or weakened by conſtruction: but if in this inſtance it has been ſo, I am glad that the deciſion in the caſe of *Randeau* v. *Wyatt* has brought us back to the letter and true ſpirit of that law."

Lawrence, J. "The caſe of *Towers* v. *Oſborne*, when truly conſidered, was not a contract for the purchaſe of goods, but for the making of ſome thing which had no exiſtence at the time. The caſe of *Clayton* and *Andrews* went, indeed, ſomewhat farther; but ſtill there was to be ſome alteration in the ſtate of the commo-

(*y*) *Ante*, 92. (*z*) *Ibid.*

dity

dity before it was to be delivered. The cases which have been determined in the Court of Chancery in aid of contracts of this kind were all founded upon the decisions which had been made at law, and considered as necessarily consequent upon them. But it is not difficult to collect what opinion was entertained of these decisions by Lord *Thurlow*, when the case of *Randeau* v. *Wyatt*, came before him in the Court of Chancery upon a bill filed to discover the facts and names of the parties in the undertaking, in order to found the action at law: he thought that the mere fact of the corn not being to be delivered immediately would not have taken the case out of the statute, if the point had been new, but he thought himself bound by the cases at law, *till they were revised by a court of law.*

So, a delivery without *an ultimate acceptance, and such as completely affirms the contract*, is not sufficient to satisfy the words of the statute.

Thus, in the case of *Kent* v. *Huskinson*, (*a*) which was an action of *assumpsit* for goods sold and delivered, tried before Lord *Alvanley*, Ch. J. The subject of the action was a bale of sponge sent by the plaintiff, a wholesale dealer in that article, residing in *London*, to the defendant, a retail dealer residing in *Staffordshire*. Some short time before the sponge was sent by the plaintiff, he had been at the place where the defendant resided, and had received from him a verbal order under which he had acted in sending the sponge, and the price charged was 11*s. per* pound, amounting altogether to 75*l.* Soon after the sponge was sent, the defendant wrote the following letter to the plaintiff: "After receiving a letter from your house, in town, stating the bale of sponge was sent by your direction, I called on a friend or two who are competent judges of the article, and asked them to say, according to the present price of sponge, what it was worth; the answer was, not more than six shillings *per* pound; have therefore returned it to you by the same conveyance it was forwarded by to this place. In future will select what sponge I may want personally, otherwise will appoint some confidential friend for that purpose." The plaintiff's son being at the defendant's house soon after the sponge was returned, was told by him that he had resolved not to keep the article, because it was not so good as he had expected. It was objected for the defendant

(*a*) 3 Bos. & Pul. 233.

that inaſmuch as this was a contract for the ſale of goods of more than 10*l.* value, the caſe fell within the 17th ſection of the ſtatute of frauds, for want of a note or memorandum in writing, and conſequently the plaintiff could not recover. His lordſhip being of this opinion, non-ſuited the plaintiff.

A motion was afterwards made for a rule to ſhew cauſe why the non-ſuit ſhould not be ſet aſide. But the court were clearly of opinion, that the caſe was within the ſtatute, and therefore refuſed the rule.

Lord *Alvanley*, Ch. J. ſaid: "At the trial I thought, and ſtill continue of opinion, that the evidence does not take this caſe out of the ſtatute of frauds. How is any judgment to be formed as to the nature of the contract between theſe parties? Poſſibly the order was for the beſt, poſſibly for the ſecond beſt ſponge, or ſponge of ſome peculiar quality; all which circumſtances are left in a ſtate of uncertainty. It was this very uncertainty, and the frauds to which it might lead, that the ſtatute had in contemplation and meant to guard againſt. The only affirmance of any contract to be collected from the evidence is an affirmance of ſome ſort of order for ſome ſort of ſponge, and it appears that the moment the article reached the defendant and was examined, he ſent it back to the plaintiff, ſaying it was not that ſort of ſponge which he wanted and had ordered. The defendant's letter cannot, as it appears to me, be conſtrued into any thing like an acceptance, ſo as to bring this caſe within the exception which has been relied on."

Heath, J. ſaid: "According to the words of the ſtatute, the exception does not apply, unleſs the vendee both receive and accept. Now that aceptance I cannot conſider to be any other than *the ultimate acceptance, and ſuch as completely affirms the contract.* What the nature of this order was, or under what circumſtance it was given, was not proved. Poſſibly the ſponge was ſent down upon ſpeculation only."

7. *Of the Contents and Signature, &c. of the Agreement or Memorandum required by the Statute.*

By the 4th clauſe of the ſtatute it is enacted, "That no action ſhall be brought, &c. unleſs the agreement upon which ſuch action ſhall be brought, or ſome *memorandum* or note thereof, ſhall be in writing, and ſigned by the party to be charged therewith, or ſome other perſon thereunto, by him lawfully authorized."

And by the 17th ſection it is further enacted, "That no contract for the ſale of any goods, &c. for the price of 10*l.* ſterling or upwards ſhall be allowed to be good, except the buyer ſhall accept part, &c. or that ſome note or *memorandum* in writing of the ſaid bargain be made and ſigned by the parties to be charged by ſuch contract, or their agents thereunto lawfully authorized."

The agreement or memorandum required by the ſtatute need not be drawn in any particular form. It may be contained in a letter, or other writing referred to by letter. But in whatever form the writing may happen to be, the agreement or promiſe mentioned in the fourth clauſe muſt contain with certainty, the conſideration for the promiſe; and alſo a ſpecification of the terms of the agreement or contract. It muſt alſo be ſigned with the name of the party to be charged therewith, or his agent lawfully authorized; otherwiſe the promiſe or contract will be void. (*a*)

I propoſe to conſider theſe parts of the two clauſes ſeparately: And,

1. *In what Caſes the Conſideration muſt be ſtated.*

The promiſe mentioned in the fourth ſection of the ſtatute muſt not only be upon a good conſideration, but the conſideration muſt be ſet forth in the agreement or memorandum.

Thus, in the caſe of *Wain* and another v *Warlters*, (*b*) the plaintiffs declared that, at the time of making the promiſe after mentioned, they were the indorſees and holders of a bill of exchange, dated the 14th of *February* 1803, drawn by one W. *Gore* upon and accepted by one J. *Hall*, whereby *Gore* requeſted *Hall*, ſeventy days after date, to

(*a*) Vide *Roberts on the Statute of Frauds*, 105 to 120. *Sugden on the law of Vendors*, 50, &c. (*b*) 5 Eaſt, 10.

pay to his, *Gore*'s, order, 56*l*. 16*s*. 6*d*. ; which bill of exchange *Gore* had before then indorſed to the plaintiffs, and which ſum in the bill mentioned, was at the time of making the promiſe by the defendant due and unpaid. And thereupon the plaintiffs, before and at the time of making the ſaid promiſe by the defendant, had retained one A. as their attorney, to ſue *Gore* and *Hall* reſpectively for the recovery of the ſaid ſum then due, &c. whereof the defendant, at the time of his promiſe, &c. had notice. And thereupon, on the 30th of *April* 1803, at, &c. in *conſideration of the premiſes and that the plaintiffs*, at the inſtance of the defendants, *would forbear* to proceed for the recovery of the ſaid 56*l*. 16*s*. 6*d*., he, the defendant, undertook and promiſed the plaintiffs to pay them by half paſt four o'clock on that day, 56*l*. and the *expences*, which had *then been incurred* by them *on the ſaid bill*. The plaintiffs then averred that they did, within a reaſonable time after the defendant's promiſe, ſtay all proceedings for the recovery of the ſaid debt, and have hitherto forborne to proceed for the recovery thereof, and that the expences by them incurred on the ſaid bill at the time of making the promiſe by the defendant, and in reſpect of their having ſo retained the ſaid A., and on account of his having, before the defendant's ſaid promiſe, drawn and engroſſed certain writs called ſpecial *capias*, againſt *Gore* and *Hall* reſpectively on the ſaid bill, amounted to 20*l*. of which the defendant had notice; yet the defendant did not at half paſt four o'clock on that day, &c. nor at any time before or ſince, pay the ſaid ſum of 56*l*. and the ſaid expences incurred, &c. There was another ſpecial count, charging that the reaſonable expences incurred on the bill were ſo much, which the defendant had refuſed to pay. And the common money counts.

In ſupport of the undertaking laid in the declaration the plaintiffs, at the trial, at *Guildhall*, produced the written engagement ſigned by the defendant, which was in theſe words: "Meſſrs. "*Wain* and Co. I will engage to pay you by half paſt four this "day, fifty-ſix pounds and expences on bill that amount on *Hall*; (ſigned) *Jno. Warlters*, (and dated) No. 2. *Cornhill, April* 30th, "1803." Whereupon it was objected, on the part of the defendant, that though the promiſe, which was to pay the debt of another, *were in writing*, as required by the ſtatute of frauds, yet that it did not expreſs the *conſideration* of the defendant's promiſe, which was alſo required by the ſtatute to be in writing; and that this omiſſion could not be ſupplied by parol evidence,

(which

(which the plaintiffs propoſed to call in order to explain the occaſion and conſideration of giving the note); and that for want of ſuch conſideration appearing upon the face of the written memorandum it ſtood ſimply as an engagement to pay the debt of another without any conſideration, and was therefore *nudum pactum*, and void.

Lord *Ellenborough* Ch. J., before whom the cauſe was tried, being of this opinion, nonſuited the plaintiff. And upon a motion for a rule to ſet aſide this nonſuit, the court determined that the conſideration ought to have been ſtated in the agreement; and therefore diſcharged the rule.

Lord *Ellenborough* Ch. J., after noticing the definition of the word *agreement* by Lord C. B. *Comyns*, who conſidered it as a thing to which there muſt be the aſſent of two or more minds, and which, he ſays, ought to be ſo certain and complete, that each party may have an action upon it, for which, in addition to the author's own authority, was cited that of *Plowden*; and better, (his lordſhip obſerved) could not be cited.

"In all caſes where by long habitual conſtruction the words of a ſtatute have not received a peculiar interpretation, ſuch as they will allow of, I am always inclined to give to them their natural ordinary ſignification. The clauſe in queſtion in the ſtatute of frauds has the word agreement ("unleſs the agreement upon "which the action is brought, or ſome memorandum or note "thereof, ſhall be in writing," &c.) And the queſtion is, whether that word is to be underſtood in the looſe incorrect ſenſe in which it may ſometimes be uſed, as ſynonymous to *promiſe* or undertaking, or in its more proper and correct ſenſe, as ſignifying a mutual contract on conſideration between two or more parties? The latter appears to me to be the legal conſtruction of the word, to which we are bound to give its proper effect; the more ſo when it is conſidered by whom that ſtatute is ſaid to have been drawn, by Lord *Hale*, one of the greateſt judges who ever ſat in *Weſtminſter Hall*, who was as competent to expreſs as he was able to conceive the proviſions beſt calculated for carrying into effect the purpoſes of that law. The perſon to be charged for the debt of another is to be charged, in the form of the proceeding againſt him, upon his ſpecial *promiſe*; but without a legal conſideration to ſuſtain it, that promiſe would be *nudum pactum* as to him. The ſtatute never meant

meant to inforce any promiſe which was before invalid, merely becauſe it was put in writing. The obligatory part is indeed the *promiſe*, which will account for the word *promiſe* being uſed in the firſt part of the clauſe, but ſtill, in order to charge the party making it, the ſtatute proceeds to require that the *agreement*, by which muſt be underſtood *the agreement in reſpect of which the promiſe was made*, muſt be reduced into writing. And, indeed, it ſeems neceſſary for effectuating the object of the ſtatute that the conſideration ſhould be ſet down in writing as well as the promiſe; for otherwiſe the conſideration might be illegal, or the promiſe might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omiſſion of which would materially vary the promiſe, by turning that into an abſolute promiſe which was only a conditional one: and then it would reſt altogether on the conſcience of the witneſs to aſſign another conſideration in the one caſe, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the *agreement* ſhould be reduced into writing, by which the conſideration, as well as the promiſe, would be rendered certain. The authorities referred to by *Comyns* all ſhow that the word *agreement* is not ſatisfied unleſs there be a conſideration, which conſideration forming part of the agreement ought therefore to have been ſhown; and the promiſe is not binding by the ſtatute unleſs the conſideration, which forms part of the agreement, be alſo ſtated in writing. Without this, we ſhall leave the witneſs whoſe memory or conſcience is to be refreſhed to ſupply a conſideration more eaſy of proof, or more capable of ſuſtaining the promiſe declared on. Finding therefore the word *agreement* in the ſtatute, which appears to be moſt apt and proper to expreſs that which the policy of the law ſeems to require, and finding no caſe in which the proper meaning of it has been relaxed, the beſt conſtruction which we can make of the clauſe is to give its proper and legal meaning to every word of it."

Groſe J. "It is ſaid that the parol evidence tendered does not contradict the agreement; but the queſtion is, whether the ſtatute does not require that the conſideration for the promiſe ſhould be in writing as well as the promiſe itſelf? Now the words of the ſtatute are, "that no action ſhall be brought whereby to charge the defendant, upon any ſpecial promiſe, to anſwer for the debt, &c. of another perſon, &c. unleſs the *agreement* upon which ſuch

action ſhall be brought, or ſome memorandum or note thereof, ſhall be in writing," &c. What is required to be in writing, therefore, is the *agreement* (not the promiſe, as mentioned in the firſt part of the clauſe,) or ſome *note or memorandum of the agreement.* Now the *agreement* is that which is to ſhow what *each party* is to do or perform, and by which *both parties* are to be bound; and *this* is required to be in *writing.* If it were only neceſſary to ſhow what *one* of them was to do, it would be ſufficient to ſtate the *promiſe* made by the defendant who was to be charged upon it. But if we were to adopt this conſtruction, it would be the means of letting in thoſe very frauds and perjuries which it was the object of the ſtatute to prevent. For without the parol evidence the defendant cannot be charged upon the written contract for want of a conſideration in law to ſupport it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol teſtimony, when the ſtatute was paſſed with the very intent of avoiding ſuch a charge, by requiring that the *agreement*, by which muſt be underſtood the whole *agreement*, ſhould be in writing."

Lawrence J. "From the looſe manner in which the clauſe is worded, I at firſt entertained ſome doubt upon the queſtion; but upon further conſideration I agree with my lord and my brothers upon their conſtruction of it. If the queſtion had ariſen merely on the firſt part of the clauſe, I conceive that it would only have been neceſſary that the *promiſe* ſhould have been ſtated in writing; but it goes on to direct that no perſon ſhall be charged on ſuch *promiſe* unleſs the *agreement*, or ſome *note or memorandum thereof*, that is, of the *agreement*, be in writing; which ſhows that the word *agreement* was meant to be uſed in a ſenſe different from *promiſe*, and that ſomething beſides the mere promiſe was required to be ſtated. And as the conſideration for the promiſe is part of the agreement, that ought alſo to be ſtated in writing."

Le Blanc J. "If there be a diſtinction between *agreement* and *promiſe*, I think that we muſt take it that *agreement* includes the conſideration for the promiſe as well as the *promiſe* itſelf; and I think it is the ſafer method to adopt the ſtrict conſtruction of the words in this caſe, becauſe it is better calculated to effectuate the intention of the act, which was to prevent frauds and perjuries, by requiring written evidence of what the parties meant to be bound by. I ſhould have been as well ſatisfied, however,

ever, if, recurring to the words uſed in the firſt part of the clauſe, they had uſed the ſame words again in the latter part, and ſaid, "unleſs the *promiſe* or *agreement* upon which the action is brought, or ſome note, or memorandum thereof, ſhall be in writing." But not having ſo done, I think we muſt adhere to the ſtrict interpretation of the word *agreement*, which means the conſideration for which, as well as the *promiſe* by which the party binds himſelf."

But the ſame rule of conſtruction does not apply to the 17th ſection of the act, *viz.* upon a contract for the ſale of goods.

Thus, in the caſe of *Egerton* v. *Matthews* and another, (*c*) which was an action on the caſe againſt the defendants for not accepting and paying for certain goods, which they had contracted to purchaſe by the following memorandum in writing: "We agree to give Mr. *Egerton* 19*d. per* pound for 30 bales of *Smyrna* cotton, cuſtomary allowance, caſh 3 *per cent.* as ſoon as our certificate is complete. (Signed) *Matthews* and *Turnbull*, and dated 2d of *Sept.* 1803." The defendants had before become bankrupts, and their certificate was then waiting for the Lord Chancellor's allowance, and after it was allowed they ſigned the memorandum again. On the opening of this caſe at the trial, before Lord *Ellenborough* Ch. J., it was objected on the authority of *Wain* v. *Warlters*, that the contract being altogether executory, and no conſideration appearing on the face of the writing for the promiſe, nor any mutuality in the engagement, it was void by the ſtatute of frauds. And it not being at the time adverted to that the caſe cited turned upon the meaning of the word *agreement* (*i. e.* to pay the debt of another) in the 4th clauſe of the ſtatute, and that this caſe was governed altogether by the 17th clauſe, the object and wording of which is different, and which has not the word *agreement*, the plaintiff was nonſuited. But on a motion for ſetting aſide the nonſuit, when the attention of the court was called to the difference of the two clauſes, Lord *Ellenborough*, on granting a rule *niſi*, expreſſed his aſſent to the diſtinction between the two caſes, and ſaid, that the nonſuit had proceeded upon a miſtake at the trial in ſuppoſing that they were the ſame. And, at a ſubſequent day, on ſhowing cauſe againſt the rule, the court determined that the caſe did not come within the ſtatute, though the contract was not ſigned by the ſeller. And Lord *Ellenborough*

(*c*) 6 Eaſt, 307. See alſo *Chammpion* v. *Plummer*, poſt, 118.

Ch.

Ch. J. obſerved, " that the words of the ſtatute were ſatisfied if there were " ſome note or memorandum in writing of the *bargain, ſigned by the parties to be charged by ſuch contract.*" And this was a memorandum of the bargain, or at leaſt of ſo much of it as was ſufficient to bind *the parties to be charged therewith*, and whoſe ſignatures to it is all that the ſtatute requires."

Lawrence J. " The caſe of *Wain* v. *Warlters* proceeded on this, that in order to charge one man with the debt of another, the *agreement* muſt be in writing; which word *agreement* we conſidered as properly including the *conſideration* moving to as well as the *promiſe* by the party to be ſo charged; and that the ſtatute meant to require that the whole agreement, including both, ſhould be in writing."

2. *Of the Contents and Signature, &c, required in a Contract or Sale of Lands, &c.*

In the caſe of *Seagood* v. *Meale* and *Leonard*, (*d*) a bill was brought for a ſpecific execution of an agreement for the purchaſe of nine houſes, which were in mortgage to the defendant *Leonard* for 150*l.* The defendant *Meale*, the owner of the houſes, agreed to ſell them to the plaintiff for ſuch a ſum of money, and the plaintiff paid him a guinea in part, and ſent a note to this effect: " Mr. *Leonard, pray deliver my writings to the bearer, I having agreed to diſpoſe of them. Am your humble ſervant.*" The defendant *Leonard* would not part with them, unleſs all his money were paid him down, and afterwards bought the houſes of *Meale* himſelf; thereupon the plaintiff brought this bill.

The defendant by his anſwer inſiſted upon the ſtatute of frauds and perjuries; and the queſtion was, whether the letter or note would bring it out of the ſtatute? for as to the payment of the guinea, that was agreed clearly of no conſequence, in caſe of an agreement touching lands or houſes; the payment of money being only binding in caſes of contracts for goods.

And it was decreed that it would not, for it ought to be ſuch an agreement as ſpecified the terms thereof, which this did not, though it was ſigned by the party; for this mentioned not the

(*d*) Prec. Chanc. 560. Stra. 426. S. C. See *Sugden on the law of Vendors*, 77.

ſum

ſum that was to be paid, nor the number of houſes that were to be diſpoſed of, whether all or ſome, or how many, nor to whom they were to be diſpoſed of, neither did this letter mention whether they were to be diſpoſed of by way of ſale or aſſignment of leaſe, and ſo all the danger of perjury, which the ſtatute was to provide againſt, would be let in to aſcertain this agreement.

So, in the caſe of *Clerk* v. *Wright*, (*e*) the plaintiff had agreed for the purchaſe of an eſtate of the defendant, but the agreement was not reduced into writing; however, in confidence of the agreement, plaintiff had given orders for conveyances to be drawn and engroſſed, and went ſeveral times to view the eſtate: ſome time after the defendant ſent a letter to the plaintiff, informing him, that at the time he contracted for the ſale of the eſtate, the value of the timber was not known to him, and that the plaintiff ſhould not have the eſtate, unleſs he would give him a larger price.

The bill was brought to carry the agreement into execution, to which the ſtatute of frauds was pleaded.

Lord Chancellor (*f*) allowed the plea, and obſerved, the letter could not be ſufficient evidence of the agreement, the terms of the agreement not being therein mentioned. As to the objection that this agreement was in part-performed, he allowed that when a man takes poſſeſſion in purſuance of an agreement, or does any act of the like nature, the court will decree an execution of it, but the circumſtances only of giving directions for conveyances and going to take a view of the eſtate he thought not ſufficient.

Lord Cancellor *Cowper*, (*g*) in ſpeaking of the fourth clauſe of the ſtatute of frauds ſaid, that that clauſe had not only directed ſuch agreements to be in writing, as if that alone were ſufficient, but went further, and directed them to be ſigned by the parties themſelves, or ſome other lawfully authorized by them for that purpoſe; that to obviate the pretence of ſuch and ſuch caſes being out of the miſchief of the ſtatute, the parliament had in general words comprehended all, and directed that all agreements ſhould be in writing, and ſigned by the party; that he knew no caſe

(*e*) 1 Atk. 12. bis. (*f*) *Hardwicke.*
(*g*) See the Caſe of *Bawdes* v. *Amhurſt*, Prec. Chan. 403.

where

where an agreement, though it were all written with the party's own hand, had been held ſufficient, unleſs it had been likewiſe ſigned by the party, and ſaid, that the party's not ſigning it was in evidence that he did not think it compleat; that he had left it to an after conſideration, and might afterwards make alterations or additions in it; and therefore, unleſs it were either ſigned by him, or ſomething equivalent done, to ſhow that he looked upon it as completed and perfected, he thought ſuch writing by the party himſelf was not ſufficient to bind him within that ſtatute.

But in the caſe of *Welford* v. *Beazely*, (*h*) a queſtion aroſe upon the ſtatute of frauds and perjuries, whether a perſon ſubſcribing a deed as a witneſs only, which ſhe knew the contents of, could be ſaid to have ſigned it within the meaning of that ſtatute.

Lord Chancellor *Hardwicke* ſaid, "The meaning of the ſtatute is to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other, and therefore, both in this court and the courts of Common Law, where an agreement has been reduced to ſuch a certainty, and the ſubſtance of the ſtatute has been complied with in the material part, the forms have never been inſiſted upon.

The word *party* in the ſtatute is not to be conſtrued party as to a deed, but perſon in general, or elſe what would become of thoſe decrees where ſigning of letters, by which the party never intended to bind himſelf, has been held to be a ſigning within the ſtatute.

There have been caſes where a letter written to a man's own agent, and ſetting forth the terms of an agreement as concluded by him, has been deemed to be a ſigning within the ſtatute, and agreeable to the proviſion of it."

Lord Hardwicke denied the general doctrine as laid down in *Bawdes* v. *Amhurſt*, though true as applied to that caſe by Lord *Cowper*, and ſaid the difference betwixt the two caſes was, that the writing there, though all in the father's hand, was only a ſketch of an agreement not ſettled or confirmed by the parties;

(*h*) 3 Atk. 503. 1 Ves. 6. 1 Wils. 118 S. C. But ſee *Hawkins* v. *Holmes*, 1 P. Wms. 770. *Stokes* v. *Moore*, 1 P. Wms. 771. n. 1.

but

but here the defendant ſigned it as a complete agreement, and, as ſhe knew the contents, is to be bound by it in the preſent caſe.

And this opinion of Lord *Hardwicke* was recognized and acted upon in the caſe of *Tawney* v. *Crowther* and another, (*i*) which was as follows: the defendant *Crowther*, being ſeiſed of a houſe called the *White Hart* inn, in *Benſon* in the county of *Oxford*, which he was deſirous of ſelling the plaintiff employed the other defendant, *Morrell*, an attorney at *Oxford*, to treat for the purchaſe; who agreed to give, and *Crowther* to take, 1100*l*, and it was agreed between them, that the agreement ſhould be reduced into writing, in order to be ſigned: it was accordingly reduced into writing; but *Crowther*, wiſhing to receive the rent due at *Michaelmas*, poſſeſſion was not to be delivered till then; but the defendant declared that his word was as good as his bond, and that he ſhould be in *Oxford* on the *Tueſday* morning, and would then call on the defendant *Morrell*, and ſign the agreement. Defendant *Crowther* not coming on *Tueſday* morning to *Oxford*, defendant *Morrell* wrote a letter to him, ſaying, that, "though he had no doubt *Crowther's* word, as "he had declared, was as good as his bond; yet as life was uncertain, "he wiſhed the agreement to be ſigned." In anſwer to this, defendant *Crowther* wrote a letter, in which he ſtated his having been from home, and acknowledged he ſaid his word ſhould be as good as his bond, and that there was time enough from thence to *Michaelmas*, to ſettle every thing; and again repeated once more, that his word ſhould always be as good as any ſecurity he could give. This letter was afterwards ſtamped.

The defendant *Crowther*, afterwards, refuſing to complete the agreement, the plaintiff filed his bill for a ſpecific performance; to which the defendant pleaded the ſtatute of frauds. This plea, however, was over-ruled, the Lord Chancellor *Thurlow* being of opinion that the letter was ſufficient to prevent the operation of the ſtatute.

But when the cauſe came on to a hearing, the ſtatute was again inſiſted on by the anſwer. Upon which the Chancellor pronounced the following judgment.

"The queſtion turns on two points, 1ſt, As it ſtands under the ſtatute of frauds; 2dly, independently of the ſtatute. And 1ſt, as to the ſtatute of frauds, it is an eaſy queſtion taken by itſelf.

(*i*) 3 Bro. Chan. Rep. 161. 318.

A good

A good deal of ingenious argument has been made uſe of to prove that the letter is inſufficient to take it out of the ſtatute of frauds. If the letter contains the terms of the agreement, or if it refers to another paper which contains the terms, that is ſufficient; for I am of opinion, that if a letter refers ſo clearly to an agreement, as to ſhow what was meant by the parties, where the exiſtence of the paper is proved by parol, that will take the caſe out of the ſtatute. Then how is the fact? *Crowther* writes a letter referring to a a paper in his own poſſeſſion, and promiſes to perform; ſuch a letter would be ſufficient to draw them from the objection, that the promiſe is not in writing. Then independent of the ſtatute: if a letter, *now*, will bind the party; before the ſtatute, a parol agreement would have been binding. The queſtion is, whether here is ſufficient to raiſe a contract that will bind. If the letter cannot be referred to the agreement, or does not contain proper terms, I cannot treat it as out of the ſtatute; but, I confeſs, on what appears here, the papers do refer to that agreement, to contain a promiſe to perform it; the defendant did intend by the letter to raiſe a confidence that the agreement ſhould be performed. If he had meant only to treat further, it would not have taken it out of the ſtatute, being only *ad referendum;* but no doubt he meant to refer to the agreement which had been reduced into writing, and which he had carried away with him. The queſtion is, whether the writing referred to in *Morrel*'s letter was that which he wiſhed to be ſigned; I think it was; then *Crowther* ſaid, he would call on him. He admits, that on the day he thought he ſhould be there, he would call; he does not deny it was for the purpoſe of ſigning the agreement. This, if it refers to the agreement, is ſufficient; and I think it does. There is evidence in the cauſe of the parol agreement, which refers it to the head of caſes where evidence is admitted of what paſſed by parol. It is argued, that he took time till *Michaelmas*, not to complete the former, but to make a further agreement; it is true the conveyance was to be at *Michaelmas*; then what are his words? "My word ſhall be as good as any ſecurity I could give." The ſigning the paper was the ſecurity pointed to. On the whole matter, therefore, he has agreed, by writing, to ſign it. Several caſes have been cited, and it has been argued, that he declined to ſign it. If he had ſaid, he never would ſign it, &c. he could not have been bound; but if he ſaid he never would ſign it, but would make it as good as if he did, it would be a promiſe to

perform it; if he ſaid he would never ſign it, becauſe he would not hamper himſelf by an agreement, it would be too perverſe to be admitted; but here I am of opinion that the agreement muſt be performed."

So, in the caſe of *Coles* v. *Trecothick*, (*k*) Lord Chancellor *Eldon* decided that the ſignature of a clerk to an agent for the ſeller, to an agreement, though in the character of a witneſs, was a ſufficient ſigning, the clerk being conſidered duly authorized to ſign for the agent.

A particular of ſale in writing is not ſufficient to take the caſe out of the ſtatute, unleſs the party purchaſed by it, or it was ſhown to him at the time of purchaſe.

Thus, in *Caſs* v. *Waterhouſe*, (*l*) the caſe was, *Waterhouſe*, the defendant, was poſſeſſed of ſeveral houſes as executrix to her huſband, for ſeveral terms of years, and which were in mortgage at the time of his death; and there were likewiſe two other houſes which the huſband had purchaſed for years, in his own and his wife's names, which were not in mortgage at his death; after the death of the huſband, the defendant, his executrix, gave out particulars, wherein were contained, as well the houſes not in mortgage, as thoſe that were in mortgage, in order to ſell them, and were ſhown the plaintiff *Caſs*, who had been much intruſted and adviſed with in all concerns of the family.

Other purchaſers not bidding enough, *Caſs* himſelf, who was a creditor of the huſband, came to an agreement with the defendant, for the purchaſe of all the houſes, and it was pretty evident in the caſe, that all the houſes were taken by the plaintiff and defendant to have been in mortgage; and that the defendant was not apprized that ſhe had any title to any of them in her own right, and upon the plaintiff's agreement there was a conveyance executed of the houſes, but by the words of it, it was reſtrained to ſuch as were in mortgage.

Afterwards, the defendant being adviſed that the houſes which were purchaſed in her huſband's name and hers, came to her by ſurvivorſhip, and were not liable to his debts; and not being in mortgage, they were not conveyed to the plaintiff; ſhe refuſed to

(*k*) 9 Ves. jun. 234. (*l*) Prec. Chan. 29.

let

let him have them, though it appeared in the cauſe, ſhe had often ſaid ſhe had ſold them, as well as the reſt, to the plaintiff, and he had paid the taxes for them; ſo this bill was brought to have the houſes conveyed, and to have a further aſſurance of the others according to a covenant.

But the bill was diſmiſſed, as to all but the making farther aſſurance; for though the court ſeemed ſatisfied that the defendant had covenanted to convey all to the plaintiff, and thought ſhe had ſo done, yet there being no agreement in writing, as to the two houſes not compriſed in the conveyance, the ſtatute of frauds and perjuries ſtood ſo full in their way, that they could not decree the conveying of them; for though the particular were in writing, and theſe two houſes mentioned in it, as well as the others; and though it was proved, that that particular was ſhowed to the plaintiff, yet it was not proved to have been ſhown to him on his purchaſe, nor that he purchaſed by it.

So, a writing in order to be binding within this ſtatute, ſhould always import the aſſent and privity of both the parties in reſpect to the treaty or tranſaction itſelf. A mere entry therefore in a ſteward's book of contracts with the tenants, was not allowed to be evidence itſelf of an agreement for a leaſe between a lord and a tenant. (*m*)

So, a contract is entire; and therefore if any part is void by the ſtatute the whole muſt fail.

Thus, in the caſe of *Cooke* v. *Tombs*, (*n*) which was a bill for a ſpecific performance of an agreement for the ſale of certain freehold premiſes and ſtock in trade, principally conſiſting of ſtock and timber for ſhip-building, and ſome houſes; the defendant pleaded the ſtatute of frauds. It appeared, that pending the negotiation, the defendant delivered to the plaintiff a particular of the premiſes and property to be ſold, and the terms or conditions of the ſale, all in his own hand writing, and ſigned by him, when it was agreed, that the plaintiff ſhould have till a certain day to conſider of the purchaſe, as he objected to the price. It was afterwards agreed, that the purchaſe ſhould take place at a reduced price; and verbal inſtructions for a conveyance were given by both

(*m*) *Charlewood* v. the Duke of *Bedford*, 1 Atk. 497.
(*n*) Ambl. 40. See alſo *Lea* v. *Barber*, Ibid 425 n. *Chater* v. *Beckett*, 7 Term Rep. 201 *et ante*, 70. S. P.

parties together to an attorney, to whom the defendant delivered the particular as inſtructions for the deed, which was prepared, read over, and approved of by the parties. The Court of *Exchequer* held, that theſe circumſtances were not ſufficient to take the agreement out of the ſtatute: that the particular was not made out as evidence of any agreement, but merely as a liſt or catalogue of the matters for ſale, to enable the purchaſer to form a proper eſtimate of their value; that it was delivered into the attorney's hands for the ſame purpoſe; and was ſigned merely to authenticate it as ſuch liſt: that it was delivered in as the foundation of a ſale at a higher price; and could be of no evidence of the terms of the ſecond contract, or even of its exiſtence; ſince with the price, the parcels alſo may have been varied: that the inſtructing an attorney to draw conveyances, and his doing ſo, is no part-performance of a contract: to take the caſe out of the ſtatute, there muſt be a part-execution of the ſubſtance of the agreement itſelf: that the agreement being void as to the land, muſt be void alſo as to the perſonal property, which was to be ſold with it; *it is one entire contract, and the whole muſt ſtand or fall together:* that it could never be the intention of the parties, that the ſtock ſhould be ſold apart from the premiſes, as moſt of it was of little comparative value ſeparately; and the *agreement being for one entire ſum, they could not ſever it.*

3. *Of the Contents and Signature, &c. of a Contract for the Sale of Goods.*

Where an order had been given for a quantity of goods, and a bill of parcels with the *vendor's name printed thereon* delivered at the ſame time to the buyer, a ſubſequent letter written and ſigned by the vendor, referring to the order, was connected with the bill of parcels, ſo as to raiſe a ſufficient contract in writing within the 17th clauſe of the ſtatute.

Thus, in the caſe of *Saunderſon* v. *Jackſon* and another, (*o*) which was an action on the caſe againſt the defendant for not delivering 1000 gallons of gin to the plaintiff within a certain time, according to a bargain entered into between them. There was a ſecond count for not delivering within a reaſonable time.

(*o*) 2 Bos. and Pul. 238. 3 Eſp Rep. 180. S. C. See alſo *Fowle* v. *Freeman*, 9 Ves. jun. 351. *Coles* v. *Trecothick*, ibid. 251.

The

The cauſe was tried before Lord *Eldon*, Ch. J. The contract for the delivery of the gin having been proved on the part of the plaintiff, the defendants inſiſted that the caſe was within the ſtatute of frauds, inaſmuch as there was no note or memorandum in writing of the bargain. The circumſtances were as follow: At the time the order for the gin was given by the plaintiff to the defendants, a bill of parcels was delivered to the former, the printed part of which was "*London*. Bought of *Jackſon* and *Hankin*, diſtillers. No. 8, *Oxford-Street*," and then followed in writing, "1000 gallons of gin, 1. in 5. gin 7*s*. 350*l*." About a month after the above period the defendants alſo wrote the following letter to the plaintiff: "Sir, we wiſh to know what time we ſhall ſend you a part of your order, and ſhall be obliged for a little time in delivery of the remainder; muſt requeſt you to return our pipes. We are, your humble ſervants, *Jackon* and *Hankin*."

On this evidence his lordſhip directed the jury to find a verdict for the plaintiff, reſerving the point made for the conſideration of the court.

When the caſe came on for argument, the court were of opinion, that it was not a caſe within the ſtatute. And Lord *Eldon*, Ch. J. ſaid: "This bill of parcels, though not the contract itſelf, may amount to a note or memorandum of the contract within the meaning of the ſtatute. The ſingle queſtion therefore is, whether if a man be in the habit of printing inſtead of writing his name, he may not be ſaid to ſign by his printed name, as well as his written name? At all events, connecting this bill of parcels with the ſubſequent letter of the defendants, I think the caſe is clearly taken out of the ſtatute of frauds. For although it be admitted that the letter which does not ſtate the terms of the agreement would not alone have been ſufficient, yet as the jury have connected it with ſomething which does, and the letter is ſigned by the defendants, there is then a written note or memorandum of the order which was originally given by the plaintiff ſigned by the defendants. It has been decided that if a man draw up an agreement in in his own hand writing, beginning "I A.B. agree, &c.," and leave a place for a ſignature at the bottom, but never ſign it, it may be conſidered as a note or memorandum in writing within the ſtatute. And yet it is impoſſible not ſee that the inſertion of the name at the begining was not intended to be a ſignature, and that the paper was meant to be incomplete until it was further

ſigned. This laſt caſe is ſtronger than the one now before us, and affords an anſwer to the argument that this bill of parcels was not delivered *as* a note or memorandum of the contract.

But, a note or memorandum not containing the name of the buyer, and ſigned by the ſeller only, is not a ſufficient ſigning within the ſtatute.

Thus, in the caſe of *Champion* and another v. *Plummer*, (*p*) which was an action againſt the defendant for not delivering to the plaintiffs 20 puncheons of treacle bought of him by the plaintiffs at 37*s. per hundred*, to be delivered on the 10th of *December*; 20 puncheons at 36*s.* 6*d. per cwt.* to be delivered on the 31ſt of *October*; and 10 puncheons at 37*s. per cwt.* to be delivered on the 1ſt of *November*.

At the trial before Sir *James Mansfield*, Ch. J. it was proved, that a bargain for the treacle in queſtion was made between the plaintiff's clerk and the defendant, as ſtated in the declaration, and that the following note was made by the plaintiff's clerk in a common memorandum book, and ſigned by the defendant as under:

Left leaf of the book.	Right leaf of the book.
"Bought of *W. Plummer*	
20 Puncheons of treacle	10 Puncheons *a.* 37
37'0	
to be delivered by 10 *Dec.*	
(Signed) *Wm. Plummer.*	
20 Puncheons treacle 36'6	
fay 37'0	
1 *Nov.*	
31 *Oct.* *Wm. Plummer.*"	

On the part of the defendant it was objected, that this did not amount to a ſufficient note or memorandum of the contract within the ſtatute of frauds, as it was not ſigned by the purchaſer; and his lordſhip being of this opinion, nonſuited the plaintiff.

A rule *niſi* was afterwards obtained calling on the defendant to ſhow cauſe why the nonſuit ſhould not be ſet aſide and a new trial had.

(*p*) 1 New Rep. 252.

The

The counsel for the defendant showed cause, and insisted that it did not appear by the memorandum who was the buyer of the goods, and, as it was not signed by the buyer, he could not be bound by it, consequently the defendant ought not to be bound by an agreement which would not bind the other contracting party. With respect to the case of *Saunderson* v. *Jackson*, (*q*) which was referred to on moving for the rule, he observed, that upon reference to the brief in that cause, it appeared that the name of the purchaser was stated in the bill of parcels, though that circumstance is not mentioned in the report, the case having turned entirely upon the sufficiency of the vendor's signature.

Sir *James Mansfield*, Ch. J. said: "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note, it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiffs; there cannot be a contract without two parties, and it is customary in the course of business to state the name of the purchaser as well as of the seller, in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain."

The other judges being of the same opinion the rule was discharged.

4. *Of Sales by Auction, and by Brokers; and of the Distinction between a Contract for the Sale of Lands and of Goods.*

Upon a sale of *goods* at a public auction, the auctioneer, after knocking down the hammer, is considered as agent for the buyer, and his setting down the name of the buyer, and the price, &c. in writing, is sufficient to satisfy the 17th clause of the statute. (*r*)

Thus, in the case of *Simon* v. *Motivos*, (*s*) the defendant bought a lot for more than 10l. at an auction, catalogues and conditions of the sale were printed, and the defendant was the best bidder. The auctioneer wrote the defendant's name and the price against

(*q*) *Ante* 116. (*r*) *Note also, the agent's authority need not be in writing.* Vide *Waller* v. *Hendon* and *Cox*, 5 Vin. Abr 524. fo. ed. See also 9 Ves. jun. 251.

(*s*) 3 Bur 1921. 1 Bl Rep 599. S. C. *But this case is said to be more accurately reported in Bul. N. P.* 280. *by the name of Simon* v. *Metivier. I have therefore taken the report of it from that book.*

the lot in the printed catalogue by the order and assent of the defendant. Between the day of the sale, and the time for taking the lot away, the defendant sent his servant to see them weighed; which he did. The defendant neglecting to take away the goods, they were re-sold at a considerable loss; and this action was brought for the difference, and the court strongly inclined that sales by auction were not within the statute of frauds, because multitudes are generally present who can testify the terms of the contract. 2dly, They held the contract was here sufficiently reduced into writing, and signed by an agent of the defendant's; for the auctioneer for that purpose was his agent. 3dly, They held the weighing by his servant was a delivery. 4thly, *Yates*, J. held that as the contract was executory, *viz.* the lot to be fetched away in six weeks, that therefore it was not within the statute.

So, in the case of *Hinde* v. *Whitehouse* and *Galan*, (*t*) which was an action of *assumpsit* to recover the price of certain sugars sold by auction to the defendants: and the point in dispute was, whether the plaintiff or defendants should bear the loss of the sugars in question, which were knocked down to the defendants, by the auctioneer, at a sale on the 20th of *September*, and which were burned on the 22d of *September* by an accidental fire in one of the king's warehouses at *Liverpool*, where they were deposited. At the trial, it was proved that the sugars, after being landed at *Liverpool* on the plaintiff's account, were deposited in one of the king's warehouses there, under the locks of the king and of the plaintiff, from whence they could not be removed until the duties were paid. Previous to the sale, samples were taken of the sugars, about half-a-pound weight out of each hogshead, according to custom. The printed catalogues of goods for sale were made out in this form, and distributed: "To be sold by auction, at *Waterhouse* and *Sill*'s office, on *Friday* the 20th of *September*, 1805 at 1 o'clock, 300 hhds *Jamaica* sugar, just landed. For particulars apply to *Thomas Hinde*, merchant, or *Waterhouse* and *Sill* brokers.

Lot	Mark	Hhds.	Gross Wt.		
1.	I. A.	10	119	3	9
2.		10	121	0	7
&c.					
23.	R. H.	12	169	3	13
&c.					
27.		15	207	2	13
&c.					

(*t*) 7 East, 558.

At

At the time of the ſale the auctioneer's printed catalogue lay on the deſk before him, and he wrote down in the ſame line with the lot purchaſed the name of the higheſt bidder, or purchaſer, and the price bid *per cwt.* thus:

Lot	Mark	Hhds.	Groſs Wt.				
23.	R. H.	12	169	3	13	74ſ.	*Whitehouſe* and *Galan.*
27.		15	207	2	13	74ſ.	*Whitehouſe* and *Galan.*

The auction was holden at the time and place appointed, and was conducted by Mr. *Sill*, as auctioneer. There was no other ſale on the ſame day. The ſamples were exhibited in the ſale-room, and the lots in queſtion were knocked down to the defendants as the higheſt bidders. At the commencement of the ſale the auctioneer, having the catalogue, and alſo a written paper containing the conditions of ſale, in his left hand at the ſame time, read the latter paper, as the conditions on which the ſale of the ſugars mentioned in the catalogue was to proceed, to the company aſſembled, (including one of the defendants) which paper was entitled "Conditions of Sugar Sale, *September* 20th 1805;" and which paper he afterwards depoſited on his deſk under the catalogue, on which catalogue he wrote his minutes of the bidders' names and prices; but the two papers were not faſtened together in any manner. He alſo made the following declaration by parol to the bidders, which, after the ſale, his clerk wrote down upon the paper of conditions of ſale. "N. B. Theſe ſugars, gentlemen, have been drawn in the warehouſe within the laſt two days; as ſuch, no allowance whatever will be made, except where an evident error is manifeſt. *The duties are not yet paid, but we intend paying them to-morrow morning.*" It is cuſtomary at ſuch ſales to give an option to the purchaſer to take the ſugars ſold according to the weights taken at the king's beam, which were marked in the catalogue, or to have them re-weighed: to this option one of the conditions of ſale points. But it is the conſtant practice for the purchaſer to declare his option before he leaves the ſale-room, if he wiſh to have them re-weighed, in order that the ſeller may know how to make out the invoices; otherwiſe, if he then declare no option, the invoices are made out according to the weight at the king's beam. In the preſent caſe the defendants declared no option. The ſugars are always weighed on landing, before they are put into the warehouſe; on which weighing the duties are aſcertained; and after that

that the ſamples are drawn. The ſamples are always delivered to the purchaſer *as a part of his purchaſe to make up the quantity;* and were accordingly delivered to the defendants on the ſame day after the ſale. The invoices were made out on *Saturday* the 21ſt of *September*, but were not delivered to the defendants till *Monday* the 23d, after the fire happened. The duties are always included in the price of the ſugars, and ſuch duties are always paid by the vendor, and are ſo required to be by the ſtat. 41. Geo. III. c. 44. and till paid the ſugars cannot be removed from the king's warehouſe. The ſale was over by a quarter paſt 4 o'clock on *Friday* the 20th, but from the hours of office, and the diſtance, there was not time after the ſale to get the entries made, and to pay the duties. *Saturday* and *Sunday* were holidays at the cuſtom-houſe; and *Monday* the 23d was kept as ſuch, being the king's coronation day. The circumſtance of *Saturday* being a holiday was not recollected at the time of the ſale, when the auctioneer declared that the duties ſhould be paid on the morrow; but the circumſtance was mentioned by the defendant *Whitehouſe*, to a clerk of *Waterhouſe* and *Sill*. On this point the jury found that there was no neglect in the vendor as to the non-payment of the duties before the fire happened, which was in the courſe of *Sunday* the 22d. The auctioneer ſaid that it often happened that purchaſers ſold their ſugars again before the duties were paid, and before they were delivered out of the warehouſe; and that after the fire the defendants gave him inſtructions to take care of the goods, and ſave what he could, *without prejudice to* the rights of the parties.

Upon this proof it was objected that there was no legal evidence ſufficient to fix the defendants with the purchaſe of theſe goods within the ſtatute of frauds; there being no memorandum in writing of the contract ſigned by the parties or their authorized agent. That the auctioneer was no authorized agent of the vendees; but that ſuppoſing he were ſo, the whole contract muſt appear upon the paper ſigned by him with the names of the defendants, whereas the conditions of ſale, which formed an eſſential part of the contract, were not ſo ſigned, nor in any ways connected, except by parol teſtimony, which was inoperative by the ſtatute, with the catalogues ſigned. And that the delivery of the ſamples was *diverſo intuitu*, and not as part of the goods contracted for. The learned judge (*u*) over-ruled the objection, but reſerved the

(*u*) *Rooke.*

point

point for the opinion of the *Court* of *King*'s *Bench*; and a verdict was found for 111*l.*

After this case had been fully argued at the bar, and the court had taken time to consider, Lord *Ellenborough*, Ch. J. delivered the opinion of the court as follows:

"This was the case of a sale by auction of sugars in the king's warehouse and which were afterwards burnt whilst they remained there under the king's lock, and deposited there for the receiving of the king's duties. And the question is, whether such a sale of those goods has taken place, as is sufficient to change *the property*, and to make them the goods of the purchasers? The goods were put up to sale on the 20th of *September*, in pursuance of a catalogue of sale which had been previously distributed for that purpose, containing the lots, marks, number of hogsheads, and gross weights of the sugars, and referring for further particulars to the brokers; and they were sold on that day, according to certain conditions of sale, which the auctioneer read to the bidders assembled, as the conditions on which the sale of the sugars enumerated in the catalogue was to be made; and the auctioneer also informed them that the duties were not then paid, but would be paid by the sellers on the morrow. It is admitted however that no laches is imputable to the sellers for the non-payment of the duties between the time of sale and the fire, which happened on the 22d of *September*. Two questions have been made on the 17 section of the statute of frauds, upon which question it depends whether what has passed between the parties as to those goods constituted a valid contract of sale in respect to them. The first question argued upon the latter words of that section is this; Is the writing which has been put upon the catalogue of sale by the auctioneer "*a note or memorandum in writing of the bargain* made and signed by the parties to be charged by the contract, *or their agents thereunto lawfully authorised*," within the meaning of the statute? The second question is, whether this be a case in which the buyer can be said to have "accepted *part of the goods sold, and actually received the same?*" But independently of and besides these questions, it has been said that sales by auction are not within the statute; and the case of *Simon* v. *Motives*, reported in 3 Burr. 1921. and 1 Blac. Rep. 599. has been relied on. The report in Burrow does not distinctly mention this latter point. But in the report of Sir W. *Blackstone*, Lord *Mansfield*, speaking of sales by auction, says, "The solemnity of that kind of sale precludes all perjury as to the fact itself of sale." He then mentions the case of a sale of sugars by auction, which

which were "afterwards confumed by fire in the auction warehouſe. and where the loſs fell upon the buyer." He afterwards adds, "According to the inclination of my preſent opinion, auctions in general are not within the ſtatute." And Mr. Juſtice *Wilmot* ſays, that he "inclined to think that ſales by auction, openly tranſacted before 500 people, are not within the ſtatute." With all deference to theſe opinions I do not at preſent feel any ſufficient reaſon for diſpenſing with the expreſs requiſition of a memorandum in writing in a ſtatute applying to all ſales of goods above the value of 10*l.*, without exception, merely becauſe the quantum of parol evidence in the caſe of an auction is likely to render the danger of perjury leſs conſiderable. That argument in a degree applies to all ſales in market overt: and if we once get looſe from the poſitive words of the ſtatute, it will become a queſtion only of the quantum and degree of danger of perjury in each particular inſtance: which opens a door to an indefiniteneſs of conſtruction founded on all the varying circumſtances of the time and frequency of perſons attending the places of ſale, and the like; which would be deſtructive of all certainty of practice, and render the rule of the ſtatute perhaps more miſchievous than beneficial to the trading world who are to be governed by it. I am not therefore prepared to ſay that ſales by auction are not meant to be comprehended within the ſtatute. Nor would I be underſtood as giving any concluſive opinion to the contrary: neither is it neceſſary that I ſhould upon the preſent occaſion. The firſt queſtion on the letter of the ſtatute is, Is this a memorandum of the bargain made *by an agent of both parties?* In reſpect to ſales of goods, it has been uniformly ſo holden ever ſince the caſe of *Simon* v. *Motives*; and it would be dangerous to break in upon a rule which affects all ſales made by brokers acting between the parties buying and ſelling, and where the memorandum in the broker's book, and the *bought and ſold notes* tranſcribed therefrom, and delivered to the buyers and ſellers reſpectively, have been holden a ſufficient compliance with the ſtatute to render the contract of ſale binding on each. All the great tranſactions of ſale in this great city are ſo conducted, and ſtand on this foundation of legality only: and it is too late, I conceive, to draw it into queſtion. Suppoſing the auctioneer or broker for ſale to be the agent of both parties, the queſtion then is, has he made a memorandum of the bargain in this caſe? and it appears to me that he has not. The minute made on the catalogue of ſale, which is *not annexed* to the *conditions of ſale*, nor has any *internal reference thereto*, by context or the like, is a mere memorandum of the name

of

of a perſon, whom perhaps we may *intend* to *be the purchaſer*, and of the quantity and price of the goods, which we may perhaps, on the foot of ſuch memorandum alſo *intend* to have been *ſold* to the perſon ſo named in the catalogue. But in treating it as ſuch memorandum throughout, we muſt intend alſo, (contrary to the fact) that the goods were ſold for ready money, and unattended by the circumſtances ſpecified in the conditions of ſale. And the conditions of ſale, though as unſigned they cannot be evidence of the bargain itſelf, are yet capable of being given in evidence; and accordingly have been ſo, as a part of the tranſaction between the parties, and in order to ſhow that it was on thoſe conditions that the goods were ſold. I am of opinion therefore that the mere writing on the catalogue, not being by any reference incorporated with the conditions of ſale, is not a memorandum of a *bargain* under thoſe conditions of ſale.

As to the next queſtion on the ſtatute; inaſmuch as the half pound ſample of ſugar out of each hogſhead in this caſe is, by the terms and conditions of ſale, ſo far treated as a part of the entire bulk to be delivered, that it is conſidered in the original weighing as conſtituting *a part of the bulk actually weighed out to the buyer*; and to be allowed for ſpecifically, if he ſhould chuſe to have the commodity re-weighed; I cannot but conſider it as *a part of the goods ſold under the terms of the ſale, accepted and actually received as ſuch by the buyer*. And although it be delivered partly *alio intuitu*, namely, as a ſample of quality, it does not therefore prevent its operating to another conſiſtent intent alſo in purſuance of the purpoſes of the parties, as expreſſed in the conditions of ſale, namely, *as a part-delivery of the thing itſelf*, as ſoon as in virtue of the bargain the buyer ſhould be entitled to retain, and ſhould retain it accordingly.

As to the laſt point made in argument, viz. that there has been no effectual ſale in this caſe made, becauſe the commodity was incapable of delivery till the king's duties were paid; and which were to be paid by the ſeller; I think that the ſale, within the meaning of the parties to the conditions, was complete, ſo as to caſt the ſubſequent riſk of loſs upon the buyer. The words, "time of ſale," and "higheſt bidder to be the purchaſer," all evidently relate to the tranſaction of ſelling at the time and place of auction; which was conſidered between them as effectual for the purpoſe of transferring the property and the conſequent riſk of loſs from the buyer to the ſeller, notwithſtanding the intermediate

diate right of cuſtody or lien upon the goods in the crown until the duty ſhould be paid. Beſides, after earneſt given, the vendor cannot ſell the goods to another without a default in the vendee: and therefore if the vendee do not come and pay for and take away the goods, the vendor ought to go and requeſt him; and then if he do not come and pay for and take away the goods in a convenient time, *the agreement is diſſolved*, and the vendor is at liberty to ſell them to any other perſon. Per *Holt*. Ch. J. in *Langford* v. *Adminiſtratrix* of *Tiler*, Salk. 113. So in Noy's Maxims, 88. it is ſaid, "If I ſell my horſe for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered; yet the *property* of the horſe is *by the bargain* in the bargainor or buyer. But if he do preſently tender me my money, and I do refuſe it, he may take the horſe, or have an action of detainment. And *if the horſe die in my ſtable between the bargain and the delivery*, I may have an action of debt for my money, becauſe *by the bargain the property was in the buyer*." On this latter ground, therefore, I do not think that the ſale is incompiete. And as the ſtatute has been ſatisfied by a part delivery of the goods ſold, accepted by the buyer, I think the contract of ſale valid as far as reſpects the ſtatute alſo, and that the rule for a new trial ſhould be diſcharged."

Some of the judges on the bench conceiving that the Lord Chief Juſtice had queſtioned generally the authority of the caſe of *Simon* v. *Motivos*, deſired to have it underſtood, that they concurred in the judgment delivered in this caſe, on the ground that a part delivery of the thing bought (which they conſidered the delivery to and acceptance of the ſamples by the buyer to be in this caſe) took the caſe out of the ſtatute; leaving the authority of that caſe to ſtand as it did before on its own ground, untouched and unſanctioned by the preſent deciſion. But the Lord Chief Juſtice declared, "that the only part of that caſe which he meant to queſtion, though it was unneceſſary at preſent to decide upon it, was the opinion thrown out that auctions were not within the ſtatute, of which he ſhould reſerve his approbation for future conſideration. But as to the other point there decided, that ſuppoſing ſales by auctioneers or brokers to be within the 17th ſection of the ſtatute, the auctioneer or broker muſt be taken to be the agent of both parties, the practice had become ſo ſettled, ſince the deciſion of that caſe, that it would be dangerous to ſhake it, and it was not his intention to queſtion it."

So,

So, a broker who is employed to ſell goods for any perſon, and who agrees for the ſale of them, and gives to the purchaſer and to his employer a ſale-note, is to be conſidered as agent for both parties, and ſuch note is a ſufficient note in writing within the ſtatute of frauds.

Thus, in the caſe of *Rucker* v. *Cammeyer*, (*v*) which was an action of *aſſumpſit*, to recover the price of ten hogſheads of ſugar ſold by the plaintiff to the defendant.

The caſe, as proved on the part of the plaintiff, was, that having a quantity of ſugars to ſell, that ſamples were ſent (as is uſual) to the plaintiff's broker. The broker was called and proved, that the ſamples were ſent to him and expoſed together with other ſamples of different ſugars: that the defendant examined the ſamples, and fixed on thoſe for which the action was brought: that he aſked the broker from whence the ſugars had come, and was anſwered, "that they came from the north—from *Scotland*." He aſked the price, and was told 63*s. per cwt.* The broker ſaid further, that he afterwards brought the plaintiff and defendant together, when he ſuppoſed the bargain was concluded, as he ſoon after received orders from the plaintiff to make out ſale-notes of ten hogſheads to the defendant at 63*s. per cwt.* Theſe ſale-notes he ſaid contained the price and quantity of the ſugar ſold, and that one of them was uſually given to the buyer, and the other to the ſeller. The plaintiff, he ſaid, had his note from him, and the defendant had ſent for his, which was delivered to him; ſoon afterwards the defendant ſent back part of the ſugar, ſaying, that he had contracted for new ſugars, but that theſe were old. He ſaid that at the time of the ſale, the defendant made no inquiry whether the ſugars were new or old.

The counſel for the defendant objected, that this contract was within the ſtatute of frauds; he ſaid that the broker being the agent of *Rucker* the plaintiff only, and there being no note in writing on the part of the defendant, either by himſelf or any agent authoriſed by him, nor proof of any direct and immediate contract of ſale with him, that it therefore was void under the ſtatute for want of a note in writing.

(*v*) 1 Eſp. Rep. 105.

Lord *Kenyon* Ch. J. ſaid, "that it was of great importance not to break in on any deciſion which had taken place on the ſtatute of frauds, and cited the caſe of *Simon* v. *Motivos*, as ruling the preſent caſe. He ſaid that the broker muſt be conſidered as the agent of both parties, and need not be conſtituted by writing, but that in this caſe he had in fact given the defendant a note in writing when he gave him the ſale-note, which he had accepted."

But on a ſale of *lands* by auction, the auctioneer is not conſidered as the agent of both parties; and therefore his entering the name of the buyer of a lot of land in his book as the purchaſer, is not a note in writing within the 4th ſection of the act.

Thus, in the caſe of *Stansfield* v. *Johnſon*, (*w*) the action was brought for not compleating a purchaſe of copyhold lands, which had been put up for ſale by auction: the defendant was the beſt bidder, the lot was knocked down to him, and being aſked his name, he ſaid *Johnſon*, and his name was written in the catalogue againſt the lot, as the purchaſer. The depoſit not being then paid, was ſoon after demanded, but the defendant refuſed either to pay it or to compleat his purchaſe, for which default the action was brought.

For the defendant it was inſiſted, that this was a caſe within the ſtatute of frauds.

The counſel for the plaintiff cited the caſe of *Simon* v. *Motivos*; and inſiſted that the auctioneer was, under the authority of that caſe, to be deemed the agent of both parties, and his ſigning the name of the defendant againſt the lot, a note in writing within the ſtatute.

Eyre Ch. J. was of opinion, that the caſe of *Simon* v. *Motivos*, *applied to the ſale of goods only*, which was a diſtinct clauſe of the ſtatute of frauds, and that the preſent caſe was expreſsly within it, and the plaintiff therefore could not recover.

So, in the caſe of *Symonds* v. *Ball*, (*x*) where the aftermath of land was ſold by auction, by the Corporation of a Borough, and

(*w*) 1 Eſp. Rep. 101. See alſo *Walker* v. *Conſtable*, 1 Boſ. and Pul. 306. 2 Eſp. Rep. 659. 7 Ves. jun. 345. S. P.

(*x*) 8 Term Rep. 151.

the

the town-clerk, who acted as agent for the sellers, wrote down the name of the purchaser in the printed catalogue, and the price to be given, for which the purchaser at the same time gave his promissory note. The aftermath was vested in the corporation by the stat. 34 Geo. III. which enacts, "that all the aftermath within the borough of *Launceston* common lands called *Hay* should be vested in the mayor and aldermen of the said borough for the time being, in trust, nevertheless to sell and dispose thereof, or otherwise to lease or demise the same by writing to any person, &c. for the best price or rent that could be had for the same."

It was objected that this was not a sale or demise in writing as required by the act of parliament. On the other side it was contended, that this was a sale and demise in writing, the town clerk having signed the agreement on the part of the corporation, and the plaintiff having on his part given a note in writing for the purchase-money: And the case of *Simon* v. *Motivos*, (*y*) was cited as being in point.

But the court were clearly of opinion, that neither the memorandum, so made by the town clerk, or the note given by the purchaser, could be deemed *a sale or demise in writing*, so neither could they be joined together for that purpose.

(*y*) *Ante*, 119.

CHAPTER V.

Of the Stamping of Contracts, Agreements, Bills, Notes, &c.

THE ſtatute 44 Geo. III. c. 98. after reciting, "Whereas the ſeveral rates and duties upon ſtamped vellum, parchment, and paper, and upon other articles and things under the care of the commiſſioners for managing the ſaid duties, are become very numerous, intricate, and complicated, and it will tend to give facility to buſineſs, and contribute materially to the public benefit to conſolidate and ſimplify the ſame;" enacts, "That from and after the 10th day of *October* 1804 all former duties ſhall ceaſe; and (*a*) in lieu thereof the ſeveral ſums of money and duties as they are reſpectively inſerted, deſcribed, and ſet forth in the column of the ſchedules marked A. and B. intituled *England;* ſhall be raiſed, levied, collected, and paid.

The duties payable on agreements, &c. which are the ſubject of the preſent work, are all contained in ſchedule A. and are as follow:

SCHEDULE A.

"Award under hand and ſeal, or under hand only, made in *England*, and whether the ſame ſhall or ſhall not be inrolled of record in or made a rule of any court, upon any number of words therein, not amounting to thirty common law ſheets (calculated at ſeventy-two words to each ſheet), of which any ſuch award ſhall conſiſt — — — £.1 10 0

And for every entire quantity of fifteen common law ſheets, (calculated at ſeventy-two words to each ſheet), of which any ſuch award, together with any ſchedule, receipt, in-

(*a*) Section 2.

ſtrument,

ſtrument, or other matter put or indorſed thereon or annexed thereto, ſhall conſiſt, (over and above the firſt fifteen common law ſheets), a further duty of £. 1 0 0

Charter party, memorandum for charter, or any other inſtrument, note, letter, or other minument or writing, between the captain, maſter, or owner of any ſhip or veſſel, and any merchant, trader, or other perſon, in reſpect to the freight or conveyance of any money, goods, wares, merchandize, or effects, laden or to be laden on board any ſuch ſhip or veſſel, upon any number of words therein, not amounting to thirty common law ſheets, (calculated at ſeventy-two words to each ſheet), of which the ſame ſhall conſiſt — — £. 1 10 0

And for every entire quantity of fifteen common law ſheets, (calculated at ſeventy-two words to each ſheet), of which any ſuch charter-party, memorandum for charter, or any other inſtrument, note, letter, or other minument, or writing, laſt above mentioned, together with any ſchedule, receipt, inſtrument, or other matter, put or indorſed therein, or annexed thereto, ſhall conſiſt, (over and above the firſt fifteen common law ſheets), a further duty of — — — £. 1 0 0

Agreement made in *England* under hand only, where the matter thereof ſhall be of the value of 20*l.* or upwards, whether the ſame ſhall be only the evidence of a contract, or obligatory upon the parties from its being a written inſtrument, upon any number of words, not amounting to thirty common law ſheets, (calculated at ſeventy-two words to each ſheet), of which any ſuch agreement ſhall conſiſt — — £. 0 16 0

And for every entire quantity of fifteen common law ſheets, (calculated at ſeventy-two words to each ſheet), of which any ſuch agreement, together with every ſchedule, receipt, inſtrument, or other matter put or indorſed thereon or annexed thereto, ſhall conſiſt, (over and above the firſt fifteen common law ſheets), a further duty of — £. 0 16 0

Special Exemptions. (*b*)

Memorandum or agreement for any leaſe at rack-rent of any meſſuage under the yearly value of five pounds.

Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial ſervant.

(*b*) Vide 23 Geo. III. c. 58. ſ. 4. *where the like exemptions are made.*

Memorandum, letter, or agreement, made for or relating to the ſale of any goods, wares, or merchandize.

Memorandum or agreement made between maſter and mariners of any coaſting veſſel for wages.

Letter or letters, containing an agreement in reſpect of any merchandize, or evidence of ſuch an agreement which ſhall paſs by the poſt between merchants and other perſons carrying on trade or commerce, and reſiding and actually being, at the time of ſending ſuch letters, at the diſtance of 50 miles from each other. *

Bill or note of lading for any goods or merchandize to be exported — — — £. 0 3 0

Proteſt — — — — 0 5 0

Notarial act, any, whatſoever — — 0 5 0

Procuration — — — — 1 0 0

Promiſſory note, or other note, for the payment of money to the bearer on demand (which may within three years after the date thereof, but not at a later period, be re-iſſued from time to time after payment at any place) where the ſum expreſſed therein, or made payable thereby, ſhall not exceed one pound and one ſhilling — — — £. 0 0 3

where the ſum ſhall exceed one pound and one ſhilling, and not exceed two pounds and two ſhillings £. 0 0 6

where the ſum ſhall exceed two pounds and two ſhillings, and not exceed five pounds and five ſhillings £. 0 0 9

where the ſum ſhall exceed five pounds and five ſhillings, and not exceed twenty pounds — £. 0 1 0

Bill of exchange, draft, order, or promiſſory or other note, for the payment of money to the bearer on demand, where the ſum expreſſed therein, or made payable thereby, ſhall amount to forty ſhillings, and ſhall not exceed five pounds and five ſhillings — — — £. 0 0 8

Bill of exchange, draft, order, or promiſſory or other note, payable otherwiſe than to the bearer on demand, where the ſum expreſſed therein or made payable thereby, ſhall amount to forty ſhillings, and ſhall not exceed five pounds and five ſhillings — — — £. 0 1 0

Bill of exchange, draft, order, or promiſſory or other note, for the payment of money where the ſum ſhall exceed five pounds five ſhillings and not exceed 30*l.* — — £. 0 1 6

where the ſum ſhall exceed 30*l.* and not exceed 50*l.* 0 2 0

* *Vide* 32 Geo. III. c. 51. *where the ſame exemption is made.*

where

where the ſum ſhall exceed 50*l.* and not exceed 100*l.* £.0 3 0
where the ſum ſhall exceed 100*l.* and nor exceed 200*l.* — — — 0 4 0
where the ſum ſhall exceed 200*l.* and not exceed 500*l.* — — — 0 5 0
where the ſum ſhall exceed 500*l.* and not exceed 1000*l.* — — — 0 7 6
where the ſum ſhall exceed 1000*l.* — 0 10 0

Foreign bill of exchange (*c*) which ſhall be drawn in ſetts according to the cuſtom of merchants, where the ſum expreſſed in ſuch bill, or made payable thereby, ſhall not exceed 100*l.* for each and every bill in each ſett. — — £.0 1 0

So drawn in ſetts, where ſuch ſums ſhall exceed 100*l.* and not exceed 200*l.* for each and every bill in each ſett — £.0 2 0

So drawn in ſetts, where ſuch ſum ſhall exceed 200*l.* and not exceed 500*l.* for each and every bill in each ſett £.0 3 0

So drawn in ſetts, where ſuch ſum ſhall exceed 500*l.* and not exceed 1000*l.* for each and every bill in each ſett £.0 4 0

So drawn in ſetts, where ſuch ſum ſhall exceed 1000*l.* for each and every bill in each ſett — — £.0 5 0

Conditional Exemption.

Bills of exchange, promiſſory and other notes and bills iſſued by the governor and company of the Bank of *England*, exempted on condition of the ſaid governor and company paying yearly 32,000*l.*

Special Exemptions.

Drafts and orders for the payment of money to bearer on demand upon any banker, or perſon or perſons acting as a banker, and reſiding or tranſacting the buſineſs of a banker within ten miles of the place at which ſuch draft or order ſhall be drawn or given, and which place ſhall be expreſſed in or upon ſuch draft or order.

Bill, remittance bill, certificate, and all other bills of what nature or deſcription ſoever, drawn by commiſſioned officers, maſters, or ſurgeons in the navy, for wages or pay, or by the commiſſioners of his Majeſty's navy, or by the commiſſioners for victualling his

(*c*) *This clauſe can only relate to foreign bills drawn in this country, and not to ſuch as are made abroad.* Vide 7 *Term Rep.* 601.

Majeſty's navy, or by the commiſſioners for taking care of ſick and wounded ſeamen, or by the commiſſioners for managing the tranſport ſervice, upon and payable by the treaſurer of his Majeſty's navy.

By the ſtatute 31ſt Geo. III. c. 25. ſ. 19. (which is ſtill in force, except as to the duties, (*d*)) it is declared, that no bill of exchange, promiſſory note, or other note, draft, or order, nor any receipt, diſcharge, acquittance, note, or memorandum, unleſs duly ſtamped, ſhall be received in evidence in any court of juſtice whatever: and the commiſſioners of ſtamps are thereby prohibited from ſtamping any bill of exchange, &c. after it is iſſued. If, however, the commiſſioners exceed their authority, and ſtamp a bill, &c. after it is iſſued, it then becomes a valid inſtrument; and, in an action brought thereon, the court will not enquire how, and at what time it was ſtamped. *

By the ſtatute 39 Geo. III. c. 107. ſect. 4. (*e*) it is enacted, "That the duties thereby granted on any bill of exchange, promiſſory note, or other note, ſhall be paid by the perſon or perſons giving the ſame." And by ſect. 5., "No bill of exchange required to be ſtamped by that act, ſhall be re-iſſued under any pretence whatever."

By the ſtat. 43 Geo. III. c. 127. ſ. 5. (*f*) after reciting that by the ſtatute 37 Geo. III. c. 136. ſ. 1. it is enacted, "that it ſhall be lawful for the commiſſioners, or their officer, upon payment of the duty and a penalty of five pounds in the ſaid act mentioned, to ſtamp any vellum, parchment, or paper, whereupon any inſtrument, matter or thing, (except bills of exchange, promiſſory notes or other notes, drafts, or orders,) ſhall have been or ſhall be engroſſed, printed, or written, liable in reſpect thereof to be ſtamped, with a ſtamp or ſtamps of a particular denomination or value, and whereon there is, or ſhall be impreſſed any ſtamp or ſtamps of a different denomination, but of an equal or greater value, in certain caſes therein mentioned:" And in the ſame ſection, after reciting, "whereas it is expedient to permit the ſame to be done without payment of the ſaid penalty," it is enacted, "that it ſhall

(*d*) Vide 44 Geo. III. c. 98. ſ. 8. * *Wright* v. *Riley*, Peake, 173.

(*e*) *This ſection of the act is alſo in force by the* 44 Geo. III. c. 98. ſ. 8.

(*f*) *This and the following ſection are likewiſe in force by the* 44. Geo. III. c. 98. ſ. 8.

be

be lawful for the ſaid commiſſioners, or their officer from and after the paſſing of this act, to ſtamp, or cauſe to be ſtamped, any ſuch vellum, parchment or paper (except as aforeſaid) in any of the caſes herein before mentioned, without payment of the ſaid penalty of five pounds required by the ſaid recited act; and every inſtrument, matter, or thing ſo ſtamped, ſhall have and be deemed of the like force and validity as if the ſaid penalty of five pounds had been paid purſuant to the direction of the ſaid act."

And by the 6th ſection of the ſame ſtatute, it is enacted, "that every inſtrument, matter, or thing, although ſtamped or impreſſed with any ſtamp of greater value than the ſtamp required by law, ſhall be valid and effectual, provided ſuch ſtamp ſhall be of the denomination required by law for ſuch inſtrument, matter, or thing; any ſtatute, law, or uſage, to the contrary notwithſtanding."

Before the paſſing of this ſtatute, an action was brought upon a promiſſory note by the indorſee, and at the trial the ſtamp on the note appeared to be a *ſeven ſhilling deed ſtamp*. Lord *Kenyon*, Ch. J. held, that the note could not be received in evidence; and the plaintiff was accordingly nonſuited. (*g*)

So, in the caſe of *Chamberlain* v. *Porter*, (*h*) it was held, that a promiſſory note drawn before the 37 Geo. III. c. 136. upon a receipt ſtamp of equal value with that required for a promiſſory note, is not available in law.

Upon the clauſe of exemption in former acts, in favour of drafts drawn on bankers, it has been holden, (*i*) that the perſon on whom a draft is drawn, muſt be a *bonâ fide* banker; and that a draft on a banker, poſt-dated, and delivered before the day of the date, though not intended to be uſed till that day, muſt be ſtamped. And, according to the ſpecial exemptions in the 44 Geo. III. c. 98. (*k*) the place where the draft is drawn, ought to be truly ſtated.

By the ſtat. 44 Geo. III. c. 98. ſ. 20. it is enacted, "That no promiſſory note or other note for the payment to the bearer on de-

(*g*) *Manning* v. *Livie*, ſittings after Mich. Term, 1796. *Bayley on Bills*, 20. 2 *ed.* See alſo *Farr.* v. *Price*, 1 Eaſt Rep 55. S. P.
(*h*) 1 New Rep. C. B. 30. But ſee *Taylor* v. *Hague*. 2 Eaſt Rep. 414.
(*i*) *Aiden* v. *Reeves*, 1 Eaſt Rep. 435. *Whitwell* v. *Bennett*, 3 Bos. and Pul. 559. (*k*) *Vide ante*, 133.

mand, of any ſum of money exceeding the ſum of twenty pounds (ſave and except promiſſory notes or other notes for the payment by or on account of the Bank of *Scotland*, or Royal Bank of *Scotland*, or the *Britiſh linen company*, to the bearer on demand, of the ſum of one hundred pounds,) ſhall be re-iſſued on any pretence whatever; but when and as ſoon as any ſuch note for the payment of any ſum of money exceeding twenty pounds, ſave and except ſuch note, for one hundred pounds as aforeſaid, ſhall be paid by or under the order or authority of the perſon or perſons by whom or on whoſe account the ſame was ſigned, or his, her, or their executors, adminiſtrators, or aſſigns, or in purſuance of any direction, nomination, or appointment for the payment thereof, contained or expreſſed in or upon any ſuch note, the ſame ſhall be taken and conſtrued to be thereupon wholly diſcharged, vacated, and ſatisfied, and ſhall be no longer negotiable or transferable to any intent or purpoſe whatever, but ſhall be forthwith cancelled; and if any perſon or perſons ſhall iſſue, utter, or negotiate, or cauſe to be iſſued, uttered or negotiated, any ſuch promiſſory note, or other note after any ſuch payment thereof as aforeſaid, or if any perſon or perſons, by whom ſuch payment as aforeſaid, ſhall be made, ſhall neglect or refuſe to cancel the ſame, or cauſe the ſame to be cancelled, every ſuch perſon or perſons ſo offending ſhall, for every ſuch offence, forfeit the ſum of twenty pounds."

And by the 24th ſection of the ſame act it is enacted, "That in any caſe where it ſhall appear to the commiſſioners of his Majeſty's ſtamp duties, upon oath or affirmation, to be made before any one or more of the ſaid commiſſioners, or otherwiſe to their ſatisfaction, that any inſtrument, matter, or thing whatſoever, except bills of exchange, promiſſory notes or other notes, drafts, orders, or receipts, required by law to be ſtamped, hath not been duly ſtamped with a ſtamp of the value by this act required, either by accident or inadvertency, or from urgent neceſſity or unavoidable circumſtances, and without any wilful delay or intention in any party to evade the duties by this act impoſed, or to defraud his Majeſty thereof, and ſuch inſtrument, matter and thing ſhall be brought to the ſaid commiſſioners to be ſtamped within twelve months after the making or execution thereof, it ſhall be lawful for ſuch commiſſioners to remit the penalty, or any part thereof, as they ſhall deem expedient."

It ſhould here be obſerved, that the caſes which will be brought before the reader in the remaining part of this chapter have all been

been determined upon former ſtamp acts. But as thoſe acts relate to duties payable on the ſame kind of inſtruments as are mentioned in the preſent ſtamp act, 44 Geo. III. c. 98., and as this act uſes nearly the ſame words as the former acts, it is conceived the following caſes will be found uſeful in the conſtruction of the preſent ſtamp act. I ſhall therefore conſider them in the following order:

1. *Of Agreements made Abroad.*
2. *Of a written Acknowledgement of a Debt.*
3. *Of diſtinct and ſeparate Agreements on one Stamp.*
4. *Of altering an Agreement, &c. after it is executed.*
5. *Of the Exemption of the Duties upon Contracts relating to the Sale of Goods.*
6. *Of the Exemption of the Duties upon Letters paſſing by the Poſt between Merchants and others, &c.*

1. *Of Agreements made Abroad.*

In the caſe of *Ximenes* v. *Jaques*, (*l*) a wager was made of 100 guineas, and the expences of travelling "that the plaintiff would not go 240 miles in 24 hours, in a poſt-chaiſe and pair of horſes, being allowed to change poſt-chaiſes and horſes as often as he pleaſed; the expences not to exceed the uſual expences of travelling on the poſt-roads in *England*. The plaintiff performed the journey in 21 hours and a half.

The plaintiff and defendant were officers on board the *Belvidere* Eaſt Indiaman; the wager was made at ſea, and the paper containing the particulars of it was dated "Ship *Belvidere* October "2, 1793, long. 63. lat. 37.;" and the agreement had been, in fact, there reduced into writing.

This paper was produced, and not being ſtamped, was objected to, on the ground that the declaration being on an agreement, the paper containing that agreement ſhould have an agreement ſtamp.

It was anſwered, that the agreement bore date at ſea, and therefore not being made within this kingdom, a ſtamp was not required.

(*l*) 1 Eſp. Rep. 311.

Lord

Lord *Kenyon*, Ch. J. was of that opinion, and received the agreement.

So, in the case of *Winbled* v. *Malmberg*, (*m*) which was an action of *assumpsit* for seamens' wages. The plaintiff and defendant were both *Swedes*, and the vessel a *Swedish* vessel.

On the trial, a paper was produced which was made originally in *Sweden*; it contained the ship's articles, with the names of the seamen on board, and the wages they were to receive. It also contained an account of any change that took place in the crew, such as, if any of them had deserted, those who had been hired in their stead, in the course of the voyage: Among others, the plaintiff had been hired in *London* on the 1st of *June* 1795; his name was there found entered, and the entry of the wages he was to receive was four dollars *per* month.

By the regulations of the court of *Sweden*, this paper is lodged in the consul's hands in *London*.

It was contended for the plaintiff that this paper should not be given in evidence, as it was offered in proof of an agreement for a hiring at a certain rate, and was not stamped.

Eyre, Chief Justice, over-ruled the objection. His lordship said, it was not an agreement between the parties, but a regulation made by the court of *Sweden* for public purposes, and evidenced by their consul.

But if an instrument be executed in a foreign country, and by the laws of that country a stamp is required, the party who holds it cannot recover upon it in this country, unless it is stamped with the proper stamp required by the laws of the foreign country.

Thus, in the case of *Alves* v. *Hodson*, (*n*) which was an action by the plaintiff, who was a sailor, against the defendant, who was a captain of a *West India* ship, called the *Neill Malcolm*, to recover the amount of wages for the voyage or run from *Jamaica* to *London*. On the trial, it was proved that the defendant engaged the plaintiff on the 25th day of *July* 1796, at *Savannah le Mar*, in *Jamaica*, for the homeward voyage, for the sum of 50 guineas; and gave him the following note:

(*m*) 1 Esp. Rep. 454.
(*n*) 2 Esp. Rep. 528. 7 Term Rep. 241. S. C.

"Three

" Three days after the arrival of the ſhip *Neill Malcolm* at her " moorings in the river *Thames*, I promiſe to pay *William Alves* " 50 guineas, if he does his duty as an able ſeaman on board the " ſaid ſhip.

" *Jamaica, July* 25, 1796. *J. Hodſon.*"

The plaintiff proved the defendant's hand-writing to the note, and the neceſſary averments in the declaration which entitled him to recover.

In anſwer to this caſe the defendant called a clerk, from the office of the ſecretary of ſtate, who produced the acts of aſſembly of the iſland of *Jamaica*, by one of which a ſtamp duty of 1*s.* 3*d.* was impoſed on every ſheet, or piece of paper, whereon was written any promiſſory note above 20*l.* and not exceeding 50*l.*, and ſo progreſſively. The note in queſtion not being ſtamped, the counſel for the defendant contended it could not be given in evidence.

On the other ſide it was contended, that this was a mere revenue law of that country, by which the courts of this country were not bound.

But Lord *Kenyon* Ch. J. ſaid, " In deciding on inſtruments made abroad, I think we are bound to conſider the laws of that country where the contract is made; and if they are not obligatory by ſuch laws, they cannot be enforced here. By the law of *Jamaica*, given in evidence, the inſtrument produced would be invalid for want of a ſtamp. I am therefore of opinion, that we cannot give it validity here. However, let the plaintiff take a verdict, with liberty for the defendant to ſet it aſide, and that a nonſuit be entered."

In the following term a motion was made to ſet aſide the verdict, and for leave to enter a nonſuit. The court were of opinion, that the paper writing was a promiſſory note, though not negotiable, and as it was not ſtamped, according tot he laws of *Jamaica*, it could not be received in evidence. But as there was a count upon a *quantum meruit* which was not conſidered at the trial, the court ordered a new trial in order to give the plaintiff an opportunity of recovering on that general count.

2. *Of a written Acknowledgement of a Debt.*

A mere written acknowledgement of a debt need not be ſtamped.

Thus,

Thus, in the caſe of *Fiſher* v. *Leſlie*, (*o*) which was an action formoney lent, and for money due on account ſtated. And to eſtabliſh part of the demand, the plaintiff produced a ſlip of paper, ſigned by the defendant in the following form: "I. O. U. eight guineas." It was contended, on behalf of the defendant, that this paper ought to have been ſtamped either as a promiſſory note, or a receipt for money.

But *Eyre*, Ch. J. ſaid, that he was of opinion, that it was merely an acknowledgement of a debt, and neither a promiſſory note, or a receipt; and admitted it in evidence.

3. *Of diſtinct and ſeparate Agreements on one Stamp.*

In the caſe of *Robſon* v. *Hall*, (*p*) which was an action of *aſſumpſit* on an agreement, whereby the defendant "betted the "plaintiff 150*l.* to 100*l.* that he did not find two geldings to trot "32 miles in two ſucceſſive hours, carrying the ſaid Mr. *Robſon*, "and no one elſe." It was afterwards, by an indorſement on the agreement, agreed, "that the bet ſhould be doubled."

The declaration contained, 1ſt. a count on a bet of 300*l.* to 200*l.*; 2dly, on the 1ſt bet of 150*l.* to 100*l.*; and laſtly, a count on another bet of 150*l.* to 100*l.*

There was, however, but one ſtamp on the agreement, and it was objected that there ought to have been two ſtamps; for that they were diſtinct and ſeparate tranſactions.

And of this opinion was Lord *Kenyon*, Ch. J. But he ruled, that as there was a count on each agreement, the plaintiff might recover one ſum of 150*l.* on the agreement which was ſtamped.

4. *Of altering an Agreement, &c. after it is executed.*

When a bill of exchange, or written agreement has been once executed by the parties, any ſubſequent alteration therein will require a new ſtamp.

(*o*) 1 Eſp. Rep. 426. (*p*) Peake's Cas. N. P. 127.

Thus,

Thus, in the caſe of *Bowman* v. *Nichol*, (*q*) which was an action by the indorſee of a bill of exchange againſt the acceptor. It appeared, at the trial, that the bill, which was drawn on a proper ſtamp, was originally dated on the 2d of *September* 1793, payable twenty one days after date, and while it continued in the hands of the drawer it was altered, with the conſent of the acceptor, to be made payable fifty-one days after date, and with the like conſent was again reſtored to twenty-one days after date, and the date of it brought forward from the 2d to the 14th *September*. This laſt alteration was made on the 30th *September*, the bill being then over due, according to the original tenor of it. After all theſe alterations it was negotiated, and came into the hands of the plaintiff. The objection taken at the trial was, that the laſt alteration made it to all intents and purpoſes a new bill, and therefore it ought to have been drawn on a new ſtamp; otherwiſe, after a bill had been once drawn on a proper ſtamp between the ſame parties, they would never make uſe of a new ſtamp again for any ſubſequent tranſaction of that ſort; but it would only be neceſſary for them to alter the dates, and give the inſtrument a new currency.

Lord *Kenyon*, Ch. J. was of this opinion, and nonſuited the plaintiff.

And the court, upon a rule obtained to ſhow cauſe why the nonſuit ſhould not be ſet aſide, were clearly of opinion, that the nonſuit was proper; for that, at the time when the laſt alteration was made the operation of the bill, as it originally ſtood, was quite ſpent; that it was a new and diſtinct tranſaction between the parties; and that therefore there ought to have been a new ſtamp.

5. *Of the Exemption of the Duties upon Contracts relating to the Sale of Goods.*

Upon the exemption made in the ſtat. 23 Geo. 3. c. 58. ſ. 4. relating to the ſale of goods, (and which is preciſely the ſame as that contained in the 44 Geo. 3. c. 98.) it has been determined, that an agreement to indemnify from any loſs on the reſale of

(*q*) 5 Term Rep. 537. 1 Eſp. Rep. 81. S. C. See *Stonelake* v. *Babb*. 5 Bur. 2673. S. P. and ſee the ſtat. 35 Geo. III. c. 63. ſ. 13. *where it is expreſsly provided that (under certain reſtrictions) any alteration in a policy of aſſurance, after it is executed, ſhall not require an additional ſtamp duty.*

goods

goods purchaſed by a broker for his principal, need not be ſtamped, it being a contract relating to the ſale of goods.

Thus, in the caſe of *Curry* v. *Edenſor*, (*r*) the plaintiff, through the medium of the defendant his broker, had made two purchaſes of cotton, the one of 50 bags from *Bateman*, the other of 40 bags from *Entwiſle*: and the defendant engaged for half *per cent.* to indemnify the plaintiff from any loſs on the reſale of them.

At the trial, before Lord *Kenyon*, the plaintiff gave parol evidence of the contract of indemnity between him and the defendant; and for further proof called upon the defendant to produce his book, upon inſpection of which it appeared that the defendant had entered a minute of the contract between the plaintiff and *Bateman* and *Entwiſle*, for the purchaſe of the cottons, at the bottom of which had been written the letter "G," which was a private mark of the defendant's, and was explained by his clerk to mean *guarantee*. It was objected, on the part of the defendant, that this entry, having been produced as written evidence of the contract, ought to have been ſtamped by virtue of the 23 Geo. 3. c. 58. which requires a ſtamp on every piece of paper upon which any agreement ſhall be written, whether the ſame ſhall be only evidence of the contract, or obligatory on the parties from its being a written inſtrument.

This queſtion was reſerved for the opinion of the Court of *King*'s *Bench*, and upon argument it was obſerved by the counſel for the defendant, that the written entry ought to have been ſtamped, by virtue of the firſt ſection of the act, and could not be conſidered as coming within the exemption in the fourth ſection, which meant only contracts relating to the ſale of goods *as between vendor and vendee*, and could not be taken to extend to other than the contracting parties.

But the court were of opinion, that this was not ſuch an agreement as was required to be ſtamped: for it was made at the time of the original contract of ſale of the goods, and *related to the ſale of them.*

But an agreement between merchants, that one ſhall take a ſhare in the outfit of a ſhip and the adventure, is not an agreement for or relating to the ſale of goods, within the proviſo contained in the 4th ſection of the 23 Geo. 3. c. 58. (*s*)

(*r*) 3 Term Rep. 524. (*s*) *Vide Leigh* v. *Banner*, 1 Eſp. Rep. 403.

So, in the case of *Waddington* and others v. *Briſlow* and others, executors of *Simmons*, (*t*) which was in action of *aſſumpſit*, for breach of the following agreement:

"Agreed this 13th of *November* 1799, to give the undermentioned gentlemen at the rate of 10*l. per* 100 weight, for the quantities of hops as attached to their reſpective names, to be in pockets and delivered at *Whitſtable*.

(Signed,) *Henry Simmons*, *Wm. Francis*, all his growth
Wm. Francis, &c. &c. about 23 acres.
(Here followed ſeveral other *Henry Simmons*, do. 22.
ſignatures.) (Here followed ſeveral other names with their reſpective quantities.)

(Signed) S. F. Waddington & Co."

On the trial it was proved, that it was cuſtomary in *Kent* for purchaſers of hops to enter into agreements while the hops are growing for the delivery at a future time, and that when no particular time is ſpecified in ſuch agreements for the delivery, it is underſtood to be within a reaſonable time after the hops are picked and dried. On the production of the above agreement it was objected that it could not be received in evidence, inaſmuch as it was not ſtamped; and the learned judge (*u*) being of that opinion, the plaintiffs were nonſuited.

And the Court of *Common Pleas*, upon a rule to ſet aſide the nonſuit, concurred in opinion with his lordſhip: the rule was therefore diſcharged.

Lord *Alvanley*, Ch. J. ſaid, "By this contract the vendor undertook to ſell to the plaintiffs the whole produce of twenty-two acres in his poſſeſſion, and if he had ſold one buſhel to any other perſon, he would have been liable to an action. He agreed to ſell the whole produce of the land in a certain ſtate: the firſt term of the agreement is, that he will ſell the whole produce of the land; and the ſecond, that it ſhall be in a certain ſtate at the time of delivery. It is therefore an agreement for the ſale of goods, wares, and merchandize, and *ſomething more*: I think the agreement is not within the exemption of the ſtatute."

Heath, J. "It appears to me that the ſubject matter of this agreement muſt be taken with reference to the time at which the contract was made. Now at that time the hops did not exiſt in the ſtate of goods, wares, and merchandize."

(*t*) 2 Boſ. and Pul. 452. (*u*) *Hotham*,

Rooke

Rooke, J. "The object of the legiſlature in introducing the exception of the 4th ſection was to prevent the duty which had been impoſed by the 1ſt ſection upon all agreements generally, from impeding ordinary commercial tranſactions. But the ſubject of the preſent agreement is a ſpeculative bargain relative to things not in *eſſe* at the time when the contract was made. It does not appear to me therefore to fall within the meaning of the exception."

Chambre, J. "There is a little ambiguity in the terms of this agreement, but that has been cleared up by the parol teſtimony. Indeed the declaration puts the matter beyond all doubt, for it ſtates the contract to be for the ſpecific produce of twenty-two acres of land, alledged to be in the poſſeſſion of the vendor. Now the ſtatute only exempts contracts for the ſale of goods, wares, and merchandiſes. But this contract gives the vendee an intereſt in the whole produce of that part of the vendor's farm which conſiſts of hop grounds. If the vendor had grubbed up the hops, or had refuſed to gather or dry them, it would have been a breach of the contract. Though I admit that a contract for the ſale of ſo many hops as twenty-two acres might produce, to be delivered at a diſtant day, might fall within the exemption of the act, notwithſtanding the hops were not in the ſtate of goods, wares, and merchandiſes, at the time of the contract made; yet I cannot think the preſent agreement within that exemption, ſince it gives an intereſt to the vendee in the produce of the vendor's land."

So, in the caſe of *Buxton* and another v. *Bedall* and another, (*v*) which was alſo an action upon the following agreement:

" *Joſeph* and *Thomas Bedall*, order of *Buxton* and *Campſty*, four " mules, 228 ſpindles each, 3 wheels, 16 inch rollers, and one " 15 inch, 13 inch ſpindles, iron top roller, a ſufficient number " of change pinions, twiſt wheels from 30 to 42 teeth, advancing " two each time, a ſet of clearers for each wheel, leaded and " covered. The wheels are to be complete and good 5s. 9*d.* " per ſpindle; payment half ready money, and the remainder in " three months; a dozen of change rollers for each wheel to be " given in. Two to be made in ſix weeks, and the remaining two in eight weeks from this time.

" *Mancheſter*, 11th *Nov.* 1801. *Joſeph* and *Thomas Bedall.*"

(*v*) 3 Eaſt Rep. 303.

The

The Court of *King*'s *Bench* were of opinion "that this contract did not come within the exception of the act, and therefore ought to be ſtamped, being a contract not for or relating to the *ſale*, but to the *making* of goods, and for work and labour to be done. It was a contract in *fieri*; as in the caſe of *Towers* v. *Oſborne*, (*w*) where the defendant having beſpoke a chariot which he refuſed to take when it was made, it was objected to an action brought to recover the value of it that the caſe was within the ſtatute of frauds, nothing being given for earneſt nor any note in writing; but the lord chief juſtice ruled it not to be within the ſtatute, which related only to contracts for the actual ſale of goods, which that was conſidered not to be, but a mere executory contract for work to be done. That in the caſe of *Curry* v. *Edenſor*, (*x*) the agreement related to the *ſale* of goods then made."

6. *Of the Exemption of the Duties upon Letters paſſing by the Poſt between Merchants and Others, &c.*

In the caſe of *Mackenzie* v. *Banks*, (*y*) which was action on the defendant's undertaking to pay the debt of his mother, who was in trade. The debt aroſe in the courſe of her buſineſs, which the defendant aſſiſted her in carrying on, though without any ſhare in it. The evidence of the undertaking was a letter written by the defendant to the plaintiff. And the queſtion was, whether it ought to have been ſtamped, as all agreements in writing are required to be by the 23 Geo. III. c. 58. "whether the writing be "only evidence of the contract, or obligatory upon the parties "from its being a written inſtrument;" or whether this letter came within the exception of the 32 Geo. III. c. 51. ſ. 1. by which it is provided that the firſt mentioned act "ſhall not extend to "make liable to the ſaid ſtamp duty any letter paſſing by the poſt "*between merchants, or other perſons carrying on trade or commerce in* "*this kingdom*, reſiding at 50 miles diſtance from each other." At the trial, the letter had been received in evidence unſtamped by Lord *Kenyon*, Ch. J. and the plaintiff obtained a verdict.

A motion was afterwards made to ſet aſide the verdict, on the ground that the letter did not fall within the terms of the exception in the latter ſtatute. And it was argued that the defendant was neither a merchant or trader: he had no concern in his mother's

(*w*) 1 *Stra.* 506. et ante 92. (*x*) Vide ante 142. (*y*) 5 *Term Rep.* 176.

buſineſs. The letter was not written by him as agent for his mother, in which caſe, perhaps, the exeception might have extended to him, but in his own individual character to pay the debt of another. His promiſe therefore was like that of any other indifferent perſon. The legiſlature only intended to protect perſons, whoſe ordinary buſineſs led them to write to each other in the courſe of their own particular callings. A perſon, who was not a trader, although he wrote a letter concerning ſome trading contract, would not be within the words or meaning of the exemption.

Per Curiam. "It appears in evidence that the defendant did carry on the buſineſs for his mother, and that this debt aroſe in the regular courſe of the trade. And therefore any letter written by him on account of that very trade, whereby he bound himſelf to another tradeſman, may fairly be conſtrued to fall within the letter and ſpirit of the act; which meant that the correſpondence of merchants and tradeſmen at a diſtance from each other, on the faith of which they had conſiderable dealings, ſhould not be fettered with ſtamps."

PART THE SECOND.

OF THE

PARTIES TO A CONTRACT, AND THEIR REPRESENTATIVES, *&c.*

In this part of the Work it is intended to ſhow what perſons may or may not contract and bind themſelves, or others for whom they contract; and alſo how far the repreſentatives of the contracting parties are bound by the contract of the perſons whom they repreſent. The ſubject, therefore, will be treated in the following order:

1. *Of Infants.*
2. *Of Married Women; and of the Huſband's liability to Contracts made by the Wife before and after Marriage.*
3. *Of Maſter and Servant.*
4. *Of Principal, Factor, and Agent.*
5. *Of Agents of Government, &c.*
6. *Of Partners.*
7. *Of Owners and Maſters of Ships, and of Seamen.*
8. *Of Pariſh Officers.*
9. *Of Truſtees.*
10. *Of Aſſignees of a Bankrupt.*
11. *Of Executors and Adminiſtrators.*

CHAPTER I.

1. *Of Contracts with Infants.*

BY the common law a perſon is called an infant till the age of 21 years. (*a*) And all contracts with infants, except for neceſſaries, are either void or voidable: (*b*) the reaſon of which is, the indulgence the law has thought fit to give infants, who are ſuppoſed to want judgment and diſcretion in their contracts and tranſactions with others, and the care it takes of them in preventing them from being impoſed upon or overreached by perſons of more years and experience. (*c*)

Therefore, if an infant be in trade, and contract a debt in buying goods, &c. for his trade, it is not recoverable againſt him, though he thereby gains his living.

Thus, in the caſe of *Whittingham* v. *Hill*, (*d*) which was an action of *aſſumpſit* for goods ſold; the defendant pleaded that he was an infant: the plaintiff replied that the goods were for the neceſſary diet and apparel of the defendant and his family; the defendant rejoined that he kept a mercer's ſhop at *Shrewſbury*, and bought the goods to ſell again, and traverſed that he bought them *pro neceſſario*, &c.: the plaintiff thereupon demurred. And, after argument, it was adjuged for the plaintiff. But afterwards, upon a writ of error, the judgment was reverſed. *Et per Curiam*: "This buying for the maintenance of the defendant's trade, though he gain thereby his living, ſhall not bind him, for an infant ſhall not be bound by his bargain for any thing but for his neceſſity, *viz.* diet and apparel, or neceſſary learning."

But it is ſaid, (*e*) Mr. Baron *Clarke* in ſuch an action before him, where the defendant gave his non-age in evidence, it appearing he

(*a*) *Co. Lit.* 171. *b.* (*b*) *Com. Dig. tit.* Enfant, *B.* 5. *C.* 2.
(*c*) *Bac. Abr. tit.* Infancy and Age, I. 3.
(*d*) *Cro. Jac.* 494. 2 *Rol. Rep.* 45. *See alſo* 1 *Rol. Abr.* 729 l. 15. *D.* 104 *b. n.* 13. *S. C.* (*e*) *Bul. N. P.* 154.

had

had been set up in a farm, and bought sheep of the plaintiff in the way of farming, directed the jury to give a verdict for the plaintiff, and said he thought the law ought not to put it in the power of infants to impose upon the rest of the world. And the *Scotch* law is agreeable to this determination. (*f*)

However, in the case of *Whywall* v. *Champion*, (*g*) *Lee*, Ch. J. ruled, "That goods sent to the defendant, who had set up a shop in the country, could not be recovered for as necessaries, he appearing to be an infant; for the law will not suffer him to trade, which may be his undoing."

So, in the case of *Dilk* v. *Keighley*, (*h*) which was an action of *assumpsit* to recover a sum of money due for work and labour. On the trial, it appeared, that the plaintiff was a writing painter, and the defendant a glazier and painter, and the work was done by the plaintiff in the way of his trade, in painting and gilding letters for the defendant's customers. It also appeared that the defendant was an infant.

On the case being opened, Lord *Kenyon*, Ch. J. expressed an opinion that the action was not maintainable, the plaintiff's counsel having admitted the infancy.

It was contended by the plaintiff's counsel, that those things were to be deemed necessaries by which an infant gained his living: that in the present case the defendant carried on trade on his own account, and the work having been done for his customers, for which he himself had been paid, and whereby he lived, was to be deemed necessaries for which he should be liable.

Per Lord *Kenyon*, Ch. J. "The law will not allow an infant to trade. The substratum of the present action is, therefore, that which by law cannot be done. No action can therefore be maintained for work done in the course of it."

And the rule of law is said (*i*) to be the same in regard to a debt incurred in repairing houses belonging to an infant.

So, a bill of exchange or other written contract made by an infant, except for necessaries, is voidable by the infant.

Thus, in the case of *Williams* v. *W. Harrison* and *R. Harrison*, (*k*) which was an action brought upon a bill of exchange drawn

(*f*) Vide *Erskine's Principles*, *l.* 1. *tit.* 7. *s.* 21.
(*g*) *Stra.* 1083. (*h*) 2 *Esp. Rep.* 480.
(*i*) 3 *Salk.* 196. Sed quære, vide, 3 *Bur.* 1717. 2 *Bulstr.* 69.
(*k*) *Carth.* 160. *Holt.* 359. *S. C.*

by the defendants, and proteſted for non-payment. *R. Harriſon*, one of the defendants, pleaded infancy in bar; to which the plaintiff demurred, upon the ground that infancy was no bar to this action, it being founded on the cuſtom of merchants.

But the court, without argument, over-ruled the demurrer, for they clearly held, "that infancy was a good bar notwithſtanding the cuſtom; for here the infant is a trader, and the bill of exchange was drawn in the courſe of trade, and not for any neceſſaries; ſo judgment was entered, that the plaintiff *Nil capiat per Billam verſus R. Harriſon.*

And *Holt*, Ch. J. cited a caſe, "That where an infant keeps a common inn, yet an action on the caſe upon the cuſtom of inns will not lie againſt him, which is ſtronger than the principal caſe."

But, although a bill be drawn, indorſed, or accepted, by a perſon under age, it will nevertheleſs be valid againſt all other perſons who are competent parties to the inſtrument. (*l*) *So it can be rendered by huſband.*

If an infant ſubmit a matter to arbitration, and an award is made againſt him, he may perform the award, or avoid it at his election, as he may all other his contracts. (*m*)

A contract made with an infant cannot be converted into a *tort* ſo as to make him liable in that form of action.

Thus, if one deliver goods to an infant upon a contract, &c. knowing him to be an infant, he ſhall not be chargeable in trover and converſion, or any other action for them; for the infant is not capable of *any contract, but for neceſſaries;* therefore, ſuch delivery is a gift to the infant: but if an infant without any contract wilfully takes away the goods of another, trover lies againſt him: it is alſo ſaid, that if he take the goods under pretence that he is of full age, trover lies, becauſe it is a wilful and fraudulent treſpaſs. (*n*)

So, in the caſe of *Jennings* v. *Rundall*, (*o*) which was a ſpecial action on the caſe in *tort*; and the plaintiff declared that at the defendant's requeſt he had delivered a mare to the defendant to be moderately ridden, but that the defendant maliciouſly intending, &c. wrongfully and injuriouſly rode the mare ſo that ſhe was da-

(*l*) Taylor v. Croker, 4 *Eſp. Rep.* 87. *See alſo* 2 *Atk.* 181, 2.
(*m*) *Bac. Abr. tit.* Infancy and Age, I. 3.
(*n*) *See* 1 *Sid.* 129. 1 *Lev.* 169. *Keb.* 905. 913. (*o*) 8 *Term. Rep.* 335.

maged, &c. It was holden, that the defendant might plead his infancy in bar, the action being founded on a contract.

And Lord *Kenyon*, Ch. J. ſaid: "The law of *England* has very wiſely protected infants againſt their liability in caſes of contract; and the preſent caſe is a ſtrong inſtance to ſhow the wiſdom of that law. The defendant, a lad, wiſhed to ride the plaintiff's mare a ſhort journey; the plaintiff let him the mare to hire; and in the courſe of the journey an accident happened, the mare being ſtrained; and the queſtion is, whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on a contract. If it were in the power of a plaintiff to convert that, which ariſes out of a *contract*, into a *tort*, there would be an end of that protection which the law affords to infants. Lord *Mansfield*, indeed, frequently ſaid that this protection was to be uſed as a ſhield, and not as a ſword; therefore if an infant commit an aſſault, or utter ſlander, God forbid that he ſhould not be anſwerable for it in a court of juſtice. But where an infant has made an improvident contract with a perſon who has been wicked enough to contract with him, ſuch perſon cannot reſort to a court of law to enforce ſuch contract. And the words "wrongfully, injuriouſly, "and maliciouſly," introduced into this declaration, cannot vary this caſe."

Groſe, J. "I am of the ſame opinion. In the caſe of *Manby* v. *Scott*, (*p*) this diſtinction was taken, that if the action againſt an infant be grounded on a contract, the plaintiff ſhall not convert it into a *tort*;" If one deliver goods to an infant on a contract knowing him to be an infant, the infant ſhall not be charged for them in trover and converſion; for by that mean all infants in *England* would be ruined." A very few years after the deciſion of that caſe the caſe of *Johnſon* v. *Pye* (*q*) aroſe, according to one report of which (*r*) Lord Ch. J. *Keeling* expreſſed great indignation at the attempt to charge an infant in *tort*, for that which was the foundadation of an action of *aſſumpſit*; he ſaid, "The judgment will ſtay "for ever, elſe the whole foundation of the common law will be "ſhaken; for this was but a ſlip, and he might have pleaded his minority here."

But, an action of *aſſumpſit* will lie againſt an infant to recover money *embezzled* by him.

(*p*) 1 *Sid.* 129. et ante 150. (*q*) 1 *Keb.* 905. (*r*) Ibid.

Thus, in the case of *Bristow* and others, assignees, &c. v. *Eastman*, (*s*) which was an action of *assumpsit* for money *had and received* to the use of the bankrupts before they became bankrupts.

The defendant had been apprentice to the bankrupts, who were merchants, and, during his apprenticeship, had been entrusted by them to make entries at the custom-house, and pay other sums of money on their account. He had frequently charged larger sums of money than those he actually paid, and the present action was brought to recover back the over-charges.

The defendant attempted to defend himself, on account of his being an infant at the time.

Lord *Kenyon*, Ch. J. said, "The question was new, and had not been decided; but he was of opinion that this action, though in *form* arising *ex contractu*, in fact arose *ex delicto*, and as he could not have defended himself by reason of his infancy if an action of *trover* had been brought for the money, so he ought not to be permitted to defend himself on that ground, in this action."

The plaintiffs, however, proved that the defendant acknowledged the fraud, and promised payment after he came of age, so that the point was not determined; the plaintiffs obtaining a verdict on this evidence.

As to the acts of infants being void or voidable, it is said, (*t*) there is a diversity between an actual delivery of the thing contracted for, and a bare agreement to deliver it only, that the first is voidable, but the last absolutely void; as if an infant deliver a horse or a sum of money with his own hands, this is only voidable, and to be recovered back in an action of account. But if an infant agrees to give a horse, and does not deliver the horse with his hand, and the donee takes the horse by force of the gift, the infant shall have an action of trespass, for the grant was merely void.

It is also laid down as a general rule, (*u*) that infancy is a personal privilege, of which no one can take advantage but the infant himself; and therefore, though the contract of the infant be void-

(*s*) *Peak's Cas. N. P.* 223. 1 *Esp. Rep.* 172. *S. C.*

(*t*) *Bac. Abr. tit.* Infancy and Age, I. 3. *And see Perk.* f. 12. 19. *Rol. Abr.* 730. l. 3. 2 *Rol. Rep.* 408. *Latch.* 10.

(*u*) 1 *Show.* 171. 3 *Mod.* 248. *See also Bac. Abr. tit.* Infancy and Age, I. 4.

able,

able, yet it ſhall bind the perſon of full age; for being an indulgence which the law allows infants, to protect and ſecure them from the fraud and impoſition of others, it can only be intended for their benefit, and is not to be extended to perſons of full age who are preſumed to act with ſufficient caution and ſecurity; and were it otherwiſe, this privilege, inſtead of being an advantage to the infant, might in many caſes turn greatly to his detriment.

Therefore it hath been adjudged, (*v*) that if an infant let a houſe to J. S., an adult, reſerving rent; and the rent be in arrear, the infant may diſtrain for the rent, or bring an action of debt; though it ſhould be objected that ſuch a contract, is not reciprocal.

So, where an infant brought an action on the caſe by her guardian, and ſet forth, (*w*) that ſhe gave the defendant 10*l.* and put herſelf to be her ſervant for ſeven years, and that, in conſideration thereof, the defendant promiſed to find her with all neceſſaries, ſave only apparel, and likewiſe promiſed to teach her to ſing and to dance; and that the defendant, within the time turned her out of the houſe, and did not teach her to ſing and dance; whereupon there was judgment by default, and a writ of enquiry of damages: it was moved to ſtay the filing of the writ of enquiry becauſe here was no conſideration, the agreement not being reciprocal; but the court held, that, though the contract might be void as to the infant, yet it bound her miſtreſs, who was of full age; and therefore ordered the writ of inquiry to be filed.

So, where an infant brought an action of *aſſumpſit*, by his guardian, and declared, (*x*) that whereas the defendant entered into his cloſe, and cut his graſs; that in conſideration the plaintiff would permit him to make it into hay, and carry it away, the defendant promiſed to give him ſix pounds for it. To this declaration the defendant demurred, upon the ground that there was no legal conſideration to ſupport the promiſe; for the infant was not bound by his permiſſion, but might ſue the defendant for the treſpaſs notwithſtanding. The court, however, gave judgment for the plaintiff.

So, in a ſimilar action upon a promiſe to pay the plaintiff, an infant, the value of certain land, in conſideration that he would ſuffer the defendant to hold and enjoy it, after the death of A. to

(*v*) 1 *Sid.* 446. 1 *Mod.* 25. (*w*) 1 *Sid.* 446. 2 *Keb.* 623.
(*x*) 1 *Vent.* 51. 1 *Mod.* 25.

the

the time of his full age; the plaintiff had judgment, although it was agreed that he was not bound by the contract. (*y*)

So, on a promise to an infant to do such an act, in consideration that the infant promised to pay such a sum; in an action of *assumpsit* by the infant, he had judgment, though the money was not paid; for the court held, that the infant's promise was only voidable at his own election, and not at the election of him to whom it was made. (*z*)

So, if a man of full age and a female of fifteen promise to intermarry, and after request by her, he marries another woman, an action on the case lies against him for the violation of the contract; for though it was objected that this was *nudum pactum* and not reciprocal, as the man could not compel her, being an infant, to perform her promise, yet being voidable as to herself only, as she finds it for her benefit, it shall bind him, being of full age. (*a*)

If an infant lose money at play, which the winner takes, such taking is a conversion, and trover and conversion lies for the infant for the sum so received; but if the infant had won, he might have retained the money, and no action would have laid against him for it. (*b*)

Of Contracts for Necessaries.

It is clearly agreed in all the books, that if an infant makes a contract for necessaries it is neither void nor voidable. (*c*) Indeed if this could be done, it is truly observed (*d*) "that miserable must the condition of *minors* be; excluded from the society and commerce of the world; deprived of necessaries, education, employment, and many advantages, if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act. The law therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts for their own benefit, and without prejudice to themselves, for the benefit of others."

(*y*) 2 *Sid.* 109. (*z*) 1 *Sid.* 41. 1 *Keb.* 1.
(*a*) 2 *Stra.* 937. *Fitzg.* 175. 279. (*b*) *Cited in* 2 *Stra.* 937. *Fitzg.* 279.
(*c*) *Co. Lit.* 172. *a.* (*d*) *Per Lord Mansfield,* 3 *Burr.* 1801.

Therefore

Therefore if an infant contracts for his neceſſary diet, apparel, waſhing, lodging, or education, it ſhall bind him. (*e*)

So, if he contracts for phyſic, or for his cure with a ſurgeon when he is wounded. (*f*)

So, if he be a houſekeeper and contracts for neceſſaries for himſelf, his wife, and family. (*g*) But an infant is not liable for neceſſaries provided in order for his marriage. (*h*)

So, a contract to pay ſo much *per annum* for his diet and ſchooling. (*i*)

So, a promiſe by an infant, in conſideration that A. had expended 7*l.* for his diet and teaching, to pay him that ſum. (*k*)

Inſtructing an infant in a uſeful trade, ſeems to fall within the deſcription of *neceſſaries*. (*l*)

A captain in the army, being under age, is liable to pay for a livery ordered for his ſervant, as neceſſaries, but not for cockades ordered for the ſoldiers of his company.

Thus, in the caſe of *Hands* v. *Slaney*, (*m*) which was an action for goods ſold and delivered, it appeared that the goods in queſtion were a livery for the defendant's ſervant, who was a captain in the army, and cockades for ſome of the ſoldiers belonging to his company, which were furniſhed by the plaintiff at the defendant's requeſt. The defendant, who was a minor, relied upon his infancy, inſiſting that the goods in queſtion were not within the deſcription of neceſſaries; for which only he was liable. But Lord *Kenyon*, before whom the cauſe was tried, left it to the jury to conſider whether the livery for a ſervant were not neceſſary and ſuitable to the plaintiff's degree, and the cockades a neceſſary expence incidental to his ſituation; and the jury being of opinion that they were, found a verdict for the plaintiff.

But a motion for a new trial was afterwards made. The court, however, were of opinion, that the livery for the defendant's ſervant was neceſſary to the defendant's ſtation in life; but that the cockades could not come within that deſcription.

Lord *Kenyon* Ch. J. ſaid, "The cockades cannot be conſidered as neceſſaries for the defendant, and ought not to have

(*e*) *Co. Lit.* 172. *a. Sir W. Jones*, 146. 182. 1 *Rol. Abr.* 729. *l.* 5. 6. 30. 35. *Latch.* 157. *Dy.* 104. *b. in marg.* 1 *Sid.* 112. *Mar.* 40.
(*f*) *Co. Lit.* 172 *a. Pal.* 528.
(*g*) 1 *Sid.* 112. *Cart.* 215. 1 *Stra.* 168. (*h*) Ibid.
(*i*) 1 *Rob. Abr.* 729 *l.* 35. *Pal.* 520. (*k*) *Sir W. Jones.* 182.
(*l*) *See* 1 *Woodeſon's Lec.* 402. *n. f.*
(*m*) 8 *Term Rep.* 578. *See alſo Cart.* 215.

been

been included in the damages; though it cannot be worth the defendant's while to be at the expence of another trial to apportion the damages. But as to the other article furniſhed, namely, the livery, I cannot ſay that it was not neceſſary for a gentleman in the defendant's ſituation to have a ſervant; and if it were proper for him to have one, it was equally neceſſary that the ſervant ſhould have a livery. The general rule is clear, that infants are liable for neceſſaries according to their degree and ſtation in life. This defendant was placed in a ſituation which required ſuch an attendant. Therefore, however inclined I am in general to protect infants againſt improvident contracts, I think that this caſe falls within the fair liability which the law impoſes on infants of being bound for neceſſaries, which is a relative term, according to their ſtation in life."

In all caſes it muſt appear that the articles furniſhed were actually neceſſary, and ſuitable to the infant's eſtate and condition, of which the court and jury will determine; (*n*) and the law, diſtinguiſhes between perſons as to the fitneſs of neceſſaries; as, for inſtance, between a nobleman and a gentleman's ſon; ſo alſo, as to the time and place of education; as at *ſchool*, *Oxford*, and the *inns* of court. (*o*)

An infant who lives with, and is properly maintained by her parent, cannot bind herſelf to a ſtranger for neceſſaries.

Thus, in the caſe of *Bainbridge* v. *Pickering*, (*p*) which was an action for feathered caps, and other ornamental apparel ſold to the defendant, who at the time of the ſale was an infant, and lived with her mother.

Gould Juſt. ſaid, "If an infant lives with her parent, who provides ſuch apparel as appears to the parent to be proper, ſo that the child is not left deſtitute of cloaths, or other real neceſſaries of life, I apprehend that the child cannot bind herſelf to a ſtranger even for what might otherwiſe be allowed as neceſſaries: for no man ſhall take upon him to dictate to a parent what cloathing the child ſhall wear, at what time they ſhall be purchaſed, or of whom. All that muſt be left to the diſcretion of the father or mother. And as there is not here any pretence but that the child was decently provided for by the mother, I think we ſhould give no

(*n*) *Bac. Abr. tit.* Infancy and Age, I. 1. *Com. Dig. tit.* Enfant, *B.* 5. *Cro. Eliz.* 583.

(*o*) Vide *Cart.* 215. (*p*) 2 *Bl. Rep.* 1325.

coun-

countenance to such persons as inveigle young women into extravagance under the pretext of furnishing them with necessaries, without the previous consent of the parent."

So, it is incumbent on a tradesman before he trusts an infant with what may appear to be necessaries, to enquire whether he is provided by his parents or friends.

Thus, in the case of *Ford* v. *Fothergill* (*q*) which was an action of *assumpsit* for work and labour as a tailor. The facts were these; the defendant, being under age, came to the house of the plaintiff, in company with a gentleman who was previously a customer of his, and ordered a coat, waistcoat, and two pair of breeches, which were to be sent to the *Grecian Coffee-house*, and were accordingly sent there.

The defendant proved, that at this time he was provided by his father with all things necessary for his support. He had been very extravagant, and his father had, in the course of the year 1793, when this debt was contracted, paid many other debts contracted with other tailors to a large amount.

Lord *Kenyon* Ch. J. said, "Nothing is clearer in the law than that an infant cannot contract a debt except for necessaries. It is absolutely necessary that he should have the power of making that contract, otherwise he would starve. As to the plaintiff not knowing his fortune it is no excuse; it was incumbent on him to enquire into that, and to prove it to the jury. Whether he was living with his father or not, the person who dealt with him was bound to enquire and know who he was. He was living at a coffee-house, itself no mark of a wary disposition; the plaintiff should have enquired there, and gone to his father and enquired of him whether he was in want of these cloaths. Circumstanced as this case is, such an enquiry ought to have been made."

If an infant comes to a stranger, who instructs him in learning, and boards him, there is an implied contract in law, that the party shall be paid as much as his board and schooling are worth; but if the infant, at the time of his going there, was under the age of discretion or if he were placed there by a guardian, or friend, who agreed to pay for his board and education, the party that

(*q*) *Peake's Cas. N. P.* 229. 1 *Esp. Rep.* 211. *S. C.*

boarded

boarded him has no remedy againſt the infant, but muſt reſort to the perſon with whom he agreed. (*r*)

It is alſo ſaid, (*s*) "that it hath, of late years, been ſeveral times determined, that where a parent or relation, &c. places an infant at a boarding ſchool, the credit being given to ſuch parent, relation, &c. the maſter cannot have any remedy againſt the infant."

A fine due by an infant on an admittance to a copyhold eſtate, is recoverable againſt him during his minority.

Thus, in the caſe of *Evelyn*, bart. v. *Chicheſter*, (*t*) where it appeared that a copyhold eſtate devolved on the defendant when he was an *infant* of *ſix years* of age: a fine was aſſeſſed, and he was admitted to the eſtate on his coming of age. *Aſſumpſit* was brought for this fine; and, upon a caſe reſerved for the opinion of the Court of *King's Bench*, the queſtion was, whether *aſſumpſit* would lie for the fine, which the jury found to be a reaſonable one. The court held clearly, that the action lay: and *per Yates* Juſt. "If the defendant was ſtill an infant, I ſhould think this action maintainable. Debt, perhaps, would not lie, becauſe an infant cannot wage his law; but *aſſumpſit*, I think, would lie, as the infant continued to occupy and enjoy the eſtate. In 2 Bulſtr. 69. *Kirton* v. *Elliott*, the plaintiff recovered againſt an infant the rent upon a leaſe made to him: and it is there ſaid, "if a leaſe be made to an infant, and he occupies and enjoys, he ſhall be charged with the rent.

An infant may contract for neceſſaries. He could not have received the rents and profits of this copyhold without admittance; and he muſt previouſly pay the fine for ſuch admittance. But here, he has affirmed the whole tranſaction: he has enjoyed two years ſince he came of age."

If an infant contracts for neceſſaries, and enters into a ſingle bill, bill of exchange, or promiſſory note, he ſhall be bound by ſuch obligation. (*u*)

So, if money be actually laid out and expended in the purchaſe of neceſſaries for an infant, he ſhall be liable for the amount ſo laid out. (*v*)

(*r*) Duncomb *v.* Tickridge, *Allen* 94.
(*s*) 3 *Bac. Abr.* 595. *in marg. laſt edit. by* Gwillim.
(*t*) 3 *Bur.* 1717. *Bul. N. P.* 154.
(*u*) 1 *Rol. Abr.* 729. *l.* 20. *Cro. El.* 920. 1 *Lev.* 86. *Co. Lit.* 172. *a Carth.* 166. 2 *H. Bl.* 514.
(*v*) 5 *Mod.* 368. 10 *Mod.* 67. 12 *Mod.* 197.

So,

So, money paid for an infant to procure his liberation from an arreſt for a debt contracted for neceſſaries, may be recovered againſt him by action at law.

Thus, in the caſe of *Clarke* v. *Leſlie*, (*w*) which was an action of *aſſumpſit*, and the ſeveral counts in the declaration were for meat, drink, and other neceſſaries, found and provided for the defendant; money lent and paid to the defendant's uſe, with the other common money counts.

Part of the demand claimed aroſe in this way; the defendant had been arreſted by a writ out of the *Marſhalſea Court*, for 7*l.* 2*s.* 6*d.*, and was in cuſtody of the officer. The plaintiff was ſent for, and paid that debt to the officer; in conſequence of which the defendant was diſcharged out of cuſtody.

The defence to the action was infancy; and it was objected by the defendant's counſel, that this ſum ſo ſtated to be paid by the plaintiff to the officer, could not be recovered againſt an infant: that it could be recoverable only as money *lent and advanced* by the plaintiff to the defendant, or as *paid* to her uſe; and in either of which caſes an infant was not liable; for to entitle the party to recover the demand, it muſt be for neceſſaries, or money advanced and directly applied in the payment for neceſſaries.

It was anſwered, that the money paid by the plaintiff to procure the defendant's diſcharge, was to be deemed neceſſaries: that the legal meaning of neceſſaries was not confined to mere meat, drink, education, or articles of that deſcription: that that which procured the defendant her liberty, which enabled the defendant to earn her bread, came equally under the deſcription of neceſſaries; and as ſuch was recoverable.

Lord *Alvanley*, Ch. J. ſaid, "I agree that the demand in queſtion may come under the deſcription of neceſſaries. If the defendant had been taken into cuſtody for a debt contracted for neceſſaries, diſcharging that demand would be to pay for neceſſaries; ſo if the defendant had been in execution; that is, if at all events the defendant had made herſelf liable to the debt, and could not controvert it, paying that debt, I think, would be neceſſaries. This is my opinion; and it was the opinion of other judges of great learning: but, I think, that the plaintiff muſt ſhow that the debt, which was ſo paid here, was either for neceſ-

(*w*) 5 *Eſp. Rep.* 28.

ſaries,

ſaries, or that the party was in execution. If this was not to be required, an arreſt for a ſuppoſed or fraudulent debt might be made, and the infant might be ſubjected to the payment of the money advanced to liberate her from an arreſt, for a demand for which an infant could not legally be made liable. If therefore the plaintiff can prove, that the money paid at the ſpunging-houſe was paid to extricate her from impriſonment for a lawful debt, for which ſhe was liable, and might have gone to jail, or if ſhe was then in execution, I think the money paid may be recovered, as being expended for the benefit of the infant; but if no evidence of that kind is given, as ſhe may have been in cuſtody on *meſne proceſs* for a debt to which ſhe, as an infant, was not liable: as ſhe may have been arreſted fraudulently by the very plaintiff, to cover the advance of money, I think the plaintiff cannot recover. I go farther; for even if this debt in the ſpunging-houſe were to be conſidered as for neceſſaries, I am not prepared to ſay, that if the plaintiff had paid the debt for the infant, in order to enable her to return to a ſtate of proſtitution, as has been ſuggeſted, ſo that the debt thereby created muſt be diſcharged by the wages of proſtitution, the plaintiff would, in that caſe, be entitled to recover; for the tranſactions would be tainted by the ſame immoral conſideration."

But though an infant may bind himſelf in a *ſingle bill* for neceſſaries, yet if he enter into an obligation, and a *penalty* be annexed to it, ſuch obligation is void.

Thus, in the caſe of *Ayliff* v. *Archdale*. (*x*) The caſe upon demurrer was, the plaintiff had paid certain money for the neceſſary meat and drink of the defendant, being an infant, and took an *obligation in the double ſum* for the payment thereof; and whether this were good or voidable? was the queſtion. The whole court held it to be void; but if the plaintiff had taken an obligation of the very ſum which he laid out for his neceſſary maintenance, it had been otherwiſe.

If, however, an infant and a ſurety enter into an obligation with a penalty for neceſſaries found for the former, the bond will bind the ſurety, although it will not bind the infant.

It is alſo ſaid, (*y*) that if an infant becomes indebted for neceſſaries, and enters into a bond with a penalty for the amount, this

(*x*) *Cro El.* 920. *See alſo Co.* Lit. 172. *a. Mo.* 679. *Godb.* 219. 2 *H. Bl.* 514.

(*y*) *Bac. Abr. tit* Infancy and Age. I. 1.

ſhall

ſhall not drown the ſimple contract, becauſe the bond has no force.

If one lends money to an infant, who actually lays it out for neceſſaries, yet this ſhall not bind the infant, nor ſubject him to an action; for it is upon the lending that the contract muſt ariſe; and the law will not intruſt an infant with the application and laying out of money: and the infant's applying it afterwards for neceſſaries will not, by matter *ex poſt facto*, entitle the plaintiff to an action. (*z*)

So, an *inſimul computaſſet*, or account ſtated, lies not againſt an infant, though the particulars of the account be for neceſſaries; for the law conſiders an infant as not having ſufficient diſcretion to agree to an account, and the *aſſumpſit* is upon the account. (*a*)

Of Contracts made with Infants out of England.

If an action be brought againſt an infant upon a contract made with him in *Scotland*, to which infancy is pleaded, or given in evidence, under the general iſſue, the defendant, at the trial, muſt be prepared to prove, what the law of that country is in regard to infants; otherwiſe he will be liable.

Thus, in the caſe of *Male* v. *Roberts*, (*b*) which was an action of *aſſumpſit* for money paid, laid out, and expended to the uſe of the defendant, money lent and advanced, to which the defendant pleaded the general iſſue of *non aſſumpſit*.

The caſe, as opened by the plaintiff's counſel, was, that the plaintiff and the defendant were performers at the *Royal Circus*: while the company were performing at *Edinburgh*, in *Scotland*, the defendant had become indebted to one *Cockburn* for *liquors* of different ſorts, with which *Cockburn* had furniſhed him; not having diſcharged the debt, and it being ſuſpected that the defendant was about to leave *Scotland*, *Cockburn* arreſted him, by what is there termed a writ of *Fugé*: the object of which is to prevent the debtor from abſconding.

(*z*) Vide 1 *Salk.* 279. 387. 5 *Mod* 368. 10 *Mod.* 67. *Bul. N. P.* 154.
(*a*) Trueman v. Hurſt, 1 *Term Rep.* 40. (*b*) 3 *Eſp. Rep.* 113.

The defendant being then unable to pay the money, the plaintiff paid it for him; and he was liberated. The preſent action was brought to recover the money ſo paid, as money paid to his uſe.

The defence relied upon was, that the defendant was an infant when the money was ſo advanced.

Lord *Eldon*, Ch. J. ſaid: "It appears from the evidence in this cauſe, that the cauſe of action aroſe in *Scotland*; the contract muſt be therefore governed by the laws of that country where the contract ariſes. Would infancy be a good defence, by the law of *Scotland*, had the action been commenced there?"

For the defendant it was contended, that the contract was to be governed by the laws of *England*; in which caſe the plaintiff could recover for neceſſaries only. That at all events it ſhould not be preſumed that the laws were different; and as it appeared that the debt did not accrue for neceſſaries, the plaintiff could neither recover on the counts for money paid, or for money lent to an infant.

Lord *Eldon* ſaid: "What the law of *Scotland* is with reſpect to the right of recovering againſt an infant for neceſſaries, I cannot ſay; but if the law of *Scotland* is, that ſuch a contract as the preſent could not be enforced againſt an infant, that ſhould have been given in evidence; and I hold myſelf not warranted in ſaying that ſuch a contract is void by the law of *Scotland*, becauſe it is void by the law of *England*. The law of the country where the contract aroſe muſt govern the contract; and what that law is, ſhould be given in evidence to me as a fact. No ſuch evidence has been given; and I cannot take the fact of what that law is, without evidence."

Of Contracts with Infants, ratified and confirmed by them when at full Age.

The privilege the law allows to infants being entirely calculated for their benefit, and to prevent frauds being practiſed upon them during their *minority*; hence at their full age, they are at liberty either to ratify and confirm their contracts, or to avoid them. Therefore, if an infant be furniſhed with *goods*, which do not come within the deſcription of *neceſſaries*, and after he comes of age, he ratifies

ratifies the contract by a promise to pay, he is bound by such promise, and liable to be sued thereon for the debt. (*c*)

So, if an infant give a bond, and at full age promise payment, it shall bind him. (*d*)

So, if a man enters into an obligation for payment of money for an infant, and the infant, after he comes of age, promises, in consideration that the obligee had entered into the bond and paid the money, he would pay him the debt; this promise is valid and sufficient to support an action. (*e*)

So, where an infant borrowed money, and afterwards at full age promised payment; this is a good consideration for the promise, and he shall be charged. (*f*)

But to bind a person to the payment of a debt contracted during his infancy by a new promise, made by him at full age, it must be an absolute unequivocal promise to pay.

Thus, in the case of *Thrupp* v. *Fielder*, (*g*) which was an action of *assumpsit* for goods sold and delivered, to which the defendant pleaded that he was an infant at the time of the sale: The plaintiff replied a new promise made by the defendant after he came of full age.

In support of this replication, upon which issue was joined, the plaintiff could prove no express promise whatever to pay, but gave in evidence a payment of 40*l.* made by the defendant on account of the debt, since his coming of age.

For the plaintiff, it was contended, that this payment being made generally on account of the debt, was an admission by the defendant of his liability to pay, and tantamount to a new promise.

Lord *Kenyon*, Ch. J. said: "I am of opinion this is not such a promise as satisfies the issue. The case of infancy differs from the statute of limitations: in the latter case a bare acknowledgment has been held to be sufficient. In the case of an infant I shall hold an acknowledgment not to be sufficient, and require proof of an express promise to pay, made by the infant after he has attained that age when the law presumes that he has discretion. Payment of money made, as in the present case, is no such promise."

(*c*) Southerton v. Witlock, 2 *Stra.* 690. Borthwick v. Carruthers, 1 *Term Rep.* 648.
(*d*) *Cro. El.* 127. 700. *Dy.* 272. *a. in marg.* 1 *Rol. Abr.* 18. *l.* 50.
(*e*) *Edmond's Case*, 3 *Leon.* 164. 4 *Leon.* 5. (*f*) *Comb.* 381.
(*g*) 2 *Esp. Rep.* 628.

Such a promiſe muſt alſo be made *voluntarily*, and given with knowledge that the party was diſcharged by his non-age.

Thus, in the caſe of *Harmer* v. *Killing*, (*h*) the facts were theſe: the defendant had been furniſhed with goods during his infancy; and after he came of age, the plaintiff came to him to demand the money. The perſon ſent ſaw the defendant, and threatened to arreſt him: upon which the defendant agreed to give his note for it. But happening to mention to a friend of his what he was about to do, his friend ſaid, "don't do it: draw upon your father's executors." He then refuſed to do any thing.

It was contended, that this was not ſuch a promiſe as was ſufficient in law to bind the defendant.

Lord *Alvanley*, Ch. J. ſaid: "That the infant was diſcharged by his non-age for goods, not neceſſaries, if furniſhed to him before his full age; but that he might bind himſelf by a new promiſe, after he obtained his full age: but that he held that ſuch promiſe muſt be voluntary, and given with knowledge that he then ſtood diſcharged by law: that where an infant, under the terror of an arreſt, had a promiſe extorted from him, or where it was given ignorant of the protection which the law affords him, he ſhould hold that he was not bound to it. If therefore the jury ſhould be of opinion that the facts were, that this promiſe was ſo obtained, he ſhould direct them to find for the defendant." A verdict was found for the defendant.

So, if a promiſe be made by an infant after he comes of age, to pay a debt contracted during his minority, when he is able the ability of the party to pay muſt be proved: but it is ſufficient to ſhow his oſtenſible appearance, and his circumſtances as they are open to the obſervation of the world.

Thus, in the caſe of *Cole*, executor of *Cole* v. *Saxby*, (*i*) which was alſo an action of *aſſumpſit* for money paid, &c. And it was proved, that in a converſation with the defendant reſpecting the debt, which was contracted during his infancy, the defendant ſaid, "he had had very heavy loſſes in trade; but that he would pay his part when he was able."

(*h*) 5 *Eſp. Rep.* 102. Vide *Cro. El.* 700. *S. P.* (*i*) 3 *Eſp. Rep.* 159.

Lord

Lord *Kenyon*, Ch. J. ſaid: "This is not an abſolute promiſe to pay; it is, "when he is able." I remember a caſe before Lord *Mansfield*, in *Staffordſhire*, in which he was of opinion, that it was incumbent on the plaintiff to ſhow that the defendant was of ability to pay at the time of the action brought."

The plaintiff's counſel then called a witneſs to prove to that effect. The defendant's counſel croſs-examined him as to his particular knowledge of the defendant's circumſtances; whether he knew the ſtate of his debts, or how he was circumſtanced.

Lord *Kenyon*, Ch. J. ſaid: "It was not neceſſary to inquire further than his oſtenſible appearance, and his circumſtances, as they were open to the obſervation of the world; that if appearances were that he was of ſufficient ſubſtance and ability, he ſhould hold it ſufficient to ſatisfy the promiſe."

The plaintiff did accordingly produce ſuch evidence, which ſatisfied his lordſhip, who held it to be ſufficient.

Of a Joint Contract made with an Infant and an Adult.

If a contract is made by an infant and an adult, they cannot both be ſued thereon, but the action ſhould be brought againſt the adult only, as being the ſole contracting party in point of law.

Thus, in the caſe of *Chandler* v. *Parkes* and *Danks*, (*k*) which was an action of *aſſumpſit*, for work and labour, and materials found for both defendants. *Parkes* one of the defendants pleaded the general iſſue of *non aſſumpſit*; the other defendant pleaded infancy. The plaintiff entered a *noli proſequi* as to the defendant *Danks*, and proceeded to iſſue with the other defendant *Parkes*.

Lord *Kenyon*, C. J. on the caſe being opened, and looking into the record, ſaid, "he doubted how the plaintiff could recover againſt one defendant only, in an action on a contract which he by his declaration, had ſtated to be a joint one againſt two: that the infancy being admitted, the plaintiff ought to have diſcontinued, and commenced a new action againſt the adult defendant, as being the ſole contracting party according to the legal effect of ſuch a contract, which was void againſt the infant."

(*k*) 3 *Eſp. Rep.* 76. *And ſee* Jaffray *v.* Frebain *and others*, 5 *Eſp. Rep.* 47. *S. P.*

The plaintiff's counsel contended, that the promise of an infant was not void, but voidable only; and if the plaintiff had declared against the adult defendant only, he could have pleaded in abatement, that the contract was a joint one; and quashed the plaintiff's writ.

Lord *Kenyon* said, "he continued of the same opinion; for the plea in abatement could not prevail, when it was disclosed that the other defendant was an infant."

Of Contracts made with an Infant living apart from his Father, &c.

3. Where a father, living in the country, gives his son, residing in *London*, a reasonable allowance for his expences, the son is solely liable for necessaries; and the father shall be wholly discharged from such liability.

Thus, in the case of *Crantz* v. *Gill*, (*l*) which was an action of *assumpsit* brought to recover a sum of money for clothes furnished by the plaintiff, who was a taylor, to the defendant's son, an infant. The plaintiff proved that the clothes were furnished to the young man, and that the prices were reasonable.

The case in evidence on the part of the defendant was, that the father (the defendant) resided in *Cumberland*, and had sent his son up to *London* to be employed in the business of a haberdasher. That he had sent him to the care of a Mr. *Atkinson*, with instructions to him to pay a proper sum for providing the young man with necessaries suitable to his situation.

Mr. *Atkinson* was called, and he proved the above circumstances, and that he had in fact paid the son an allowance while he was in *London*, by his father's directions; that he had ordered clothes for him, but never pledged the father's credit in any respect.

Per Lord *Kenyon*. "The goods being furnished to the son, he is himself *primâ facie* liable, they being necessaries; if tradesmen deal with him and he undertakes to pay them, they must resort to him for payment: the father it is true may be liable for necessaries

(*l*) 2 *Esp. Rep.* 471.

furniſhed to his ſon on his credit; but when he gives his ſon an allowance, that is in lieu of all charges, and the father cannot be bound by law to pay even for neceſſaries furniſhed to the ſon under thoſe circumſtances. It would be a great hardſhip on the father who would ſo be obliged twice to pay for neceſſaries furniſhed to his ſon."

So, in the caſe of *Simpſon* v. *Robertſon*, (*m*) which was an action for goods ſold and delivered. Part of the demand was, for clothes furniſhed to the ſon of the defendant, by the plaintiff, who was a taylor.

Lord *Kenyon*, Ch. J. ſaid, "he had ruled before, that if a tradeſman colludes with a young man, and furniſhes him with clothes to an extravagant degree, that though the father might have been liable, had they been to a reaſonable extent, that the tradeſman who gives credit to ſuch an extravagant degree, ſhall not at law be allowed to recover."

Of the Liability of a Father for Neceſſaries furniſhed to his Son-in-law.

A man is not bound in law to provide neceſſaries for his wife's child by a former huſband.

Thus, in the caſe of *Tubb* and others, v. *Harriſon* and another, (*n*) which was an action of *covenant*, in which the defendants, who were father and ſon, after reciting that differences had ariſen between the ſon and his wife, and that they had agreed to live ſeparate, covenanted to the plaintiffs to pay the wife an annuity of 50*l.* a year, and to pay all the debts contracted by her *which her huſband was by law liable to pay*. The breaches aſſigned were (amongſt others) that the wife had then contracted a debt of 56*l.* 16*s.* 9*d.* to *J. Brighton*, for neceſſary board and lodging, and other neceſſaries, and for money paid and laid out for neceſſaries for Mrs. *Harriſon*, and *one John Perrin, her infant ſon by a former huſband*, at her requeſt. On the trial of this cauſe, before Lord *Kenyon*, Ch. J. it was agreed that the plaintiffs ſhould take a verdict for 150*l.*; and that it ſhould be referred to an arbitrator to take an account of the particu-

(*m*) 1 *Eſp. Rep.* 17. (*n*) 4 *Term Rep.* 118.

lars of the ſeveral demands, ſo that the ſame might be ſtated to the court of *King*'s *Bench*, ſubject to their opinion and direction on the conſtruction of the covenant in the deed of ſeparation, whereon the action was brought, and whereby the defendants covenanted to pay all the debts contracted by *Sarah Harriſon*, the wife, which her huſband was by law liable to pay. The account being now delivered in, it appeared that ſeveral of the items were for the maintenance of her infant ſon by a former huſband.

This matter was ſhortly ſpoken to at the bar; and the caſe of *Rex* v. *Munday*, reported by the name of *Munden* in 1 Stra. 190. was relied on; where it was held, that a huſband was not bound to maintain his wife's mother. But it not appearing from the ſtatement of that caſe, either in *Strange* or in *Burn*, whether or not the wife were alive at the time, the court took time to conſider of the point; and on a ſubſequent day,

Lord *Kenyon* ſaid, "that he had ſeen a copy of the order in *Rex* v. *Munday*, taken from the records of the Court, by which it clearly appeared that the *wife was alive* when the order was made. The Court in that caſe reverſed the order of maintenance, on the ground that the ſtatute of *Elizabeth* only extends to natural relations. Therefore, on the authority of that caſe, we are of opinion that the huſband is not liable for the expences of maintaining the wife's child by the former huſband; and conſequently that thoſe articles in the account muſt be diſallowed."

But though a man is not bound to provide for the children of his wife by a former huſband, yet if he takes them into his houſe, and they become part of his family, he ſhall be deemed to ſtand *loco parentis*, and be liable to a contract made by his wife for their education, &c.

Thus, in the caſe of *Stone* v. *Carr*, (*o*) which was an action of *aſſumpſit*, brought by the plaintiff, who was a ſchoolmaſter, for the education and maintenance of an infant child.

The child was the ſon of the defendant's wife by a former huſband. On the defendant's marriage with the child's mother, he had taken poſſeſſion of an houſe which ſhe occupied with her children, and which houſe had belonged to the firſt huſband, the buſi-

(*o*) 3 *Eſp. Rep.* 1.

neſs

neſs ſhe had carried on was continued, and the children were ſuffered to live with him as part of the family, and provided for by him while he was at home.

For the defendant it was given in evidence, that he was gunner of an India ſhip; that during his abſence on a voyage, the boy had been put out to ſchool by his mother, to the plaintiff. His counſel then contended, that as he had never made any contract or agreement with the plaintiff, he could not be charged, by reaſon of any implied liability; and cited the caſe of *Tubb* v. *Harriſon*. (*p*)

Lord *Kenyon*, Ch. J., after referring to the caſe cited, ſaid, "the preſent was diſtinguiſhable from that: there was no doubt, if a man married a woman having children by a former huſband, he might refuſe to provide for them; and, under the authority of the *King* v. *Munday*, cited in the caſe of *Tubb* v. *Harriſon*, he could not be compelled to do it; but if a man did not ſo refuſe to entertain them, and took the children into his family, he then ſtood *loco parentis* as to them. Such was the caſe here: he had ſo adopted them, and having gone abroad, and left them in the care of his wife, he ſhould hold him to be bound by her contracts made for their maintenance and education. If ſhe had any property by her firſt huſband, the caſe was ſtronger; for then part of the property, of which the defendant poſſeſſed himſelf, belonged to the children: but even had their father died inſolvent, it would not alter his opinion. The defendant, on his marriage, had no right to take poſſeſſion of the houſe and buſineſs: he had thereby confounded all the boundaries of the property, and placed himſelf in a ſtate of reſponſibility." He therefore directed the jury to find a verdict for the plaintiff; which they accordingly did.

Of Contracts made with a Son, an Adult, carrying on the Buſineſs of his Father, &c.

Where a ſon oſtenſibly appeared as the proprietor and conductor of a buſineſs in a trade, not an extenſive one, and the father, to whom the buſineſs really belonged, was ſuperannuated and incapable of conducting it, it was determined that the ſon was liable on contracts connected with the buſineſs.

Thus, in the caſe of *Turrel* v. *Collett*, (*q*) which was an action of *aſſumpſit* to recover the value of a quantity of timber alledged to have been ſold to the defendant, who was a carpenter.

(*p*) *Ante* 157. (*q*) 1 *Eſp. Rep.* 320.

The

The defence set up was, that the timber was furnished to his father, and on his credit only; he being in the same line of business, and conducting it only for his father.

This defence was met by evidence on the part of the plaintiff, showing, that the father was a man very far advanced in years, without memory or understanding; and it was admitted that the son (the defendant) managed the business ostensibly.

Lord *Kenyon*, Ch. J. said, "that under the circumstances proved, the defence set up was inadmissible. In great concerns, where there were many partners, as in the case of great breweries, for example, notwithstanding the old age, infirmity, or insanity of one of the partners, the business might still be carried on for the benefit of the family; but in little businesses or concerns, such as the present, if the owner became devoid of memory or understanding, the business must necessarily be at an end. Here the defendant was the ostensible person who conducted the business, and with whom the contract was made: the plaintiff therefore had a right to apply to him; nor should he be allowed to turn the plaintiff round, by setting up the credit as given to one whose intellectual derangement incapacitated him from conducting the most trifling concerns of life."

CHAPTER II.

Of Contracts with Married Women.

THE ſubject of the preſent chapter will be conſidered in the following order:

1. *Of Contracts made by a Married Woman with and without the Aſſent of her Huſband.*
2. *Of Contracts with a Married Woman during the Baniſhment, &c. of her Huſband.*
3. *Of Contracts with a* Feme Covert *ſole Trader, &c.*
4. *Of Contracts with the Wife before Marriage.*
5. *Of Contracts for Neceſſaries provided for a Married Woman.*
6. *Of Contracts made by a Woman living with a Man as his Wife.*
7. *In what Caſes Huſband and Wife ought to ſue and be ſued jointly.*
8. *In what Caſes the Huſband may ſue alone, or join his Wife; and when the Huſband muſt ſue alone.*

1. *Of Contracts made by a married Woman, with and without the Aſſent of her Huſband.*

A married woman has no power to make a contract without the aſſent of her huſband precedent or ſubſequent, expreſs or implied: therefore if ſhe enters into any contract without ſuch aſſent, it is abſolutely void. (*a*)

So, if the wife ſell or diſpoſe of the goods of her huſband, without his aſſent, the ſale is void; and the huſband may recover them back by action of trover. (*b*)

So, where the wife buys goods without the conſent of her huſband, he is not chargeable for them. (*c*)

So a note or bill drawn, or indorſed by a married woman, is void.

Thus, in the caſe of *Connor* v. *Martin*, (*d*) which was an action brought by the indorſee of a promiſſory note, payable to *Suſan Connor*, or her order, and given to her before marriage; which note, after her marriage and while *covert*, ſhe indorſed to the plaintiff: the defendant pleaded that *Suſan Connor* was married at the time of the making the indorſement: the plaintiff demurred; and the queſtion upon argument was, whether the plaintiff could maintain the action upon a note indorſed by a *feme covert?* The whole Court were of opinion, that the *feme covert* could not aſſign the note, becauſe by act of law it became the ſole right and property of her huſband.

So, in the caſe of *Barlow* v. *Biſhop*, (*e*) which was alſo an action by the indorſee of a promiſſory note againſt the maker, which note was drawn payable to one *Ann Parry* or order, at two months after date, for 41*l.* 10*s.*, and by her indorſed to the plaintiff. The firſt count of the declaration was upon the note, to which were added the common money counts. At the trial, before Lord *Kenyon*, Ch. J. it appeared in evidence, that *Ann Parry* was a married woman, carrying on trade at *Birmingham* in her own name, with the conſent of her huſband; and that the plaintiff, who lived in *London*, had furniſhed her with goods to the

(*a*) *Ruled by all the Judges in the caſe of* Manby *v.* Scott, 1 *Sid.* 120. 1 *Lev.* 4. 1 *Mod.* 128.
(*b*) *Com. Dig. tit.* Baron and Feme. (*c*) 4 *Leon.* 42.
(*d*) *Cited in* 3 *Wils.* 5. *See alſo* 1 *Stra* 516 *S. C.*
(*e*) 1 *Eaſt Rep.* 432. 3 *Esp. Rep.* 266. *S. C.*

amount

amount of the note, dealing with her as a *feme ſole*; that the plaintiff, after much delay, having preſſed for payment, the defendant, with a view to ſerve Mrs. *Parry*, gave her the note in queſtion, with knowledge of her being married, and with a view that ſhe ſhould pay it over to the plaintiff, in order to ſtop his proceeding againſt her, which ſhe did by indorſing it over to him. A verdict was taken for the plaintiff, with leave to the defendant to move the court to enter a nonſuit, if they ſhould be of opinion that the plaintiff could not recover upon any of the counts.

The Court of *King's Bench* were of opinion, that the indorſement was void, and that the plaintiff could not recover upon any of the counts.

Lord *Kenyon*, Ch. J. ſaid, "I ſaved the point at the trial, not from any doubt entertained by myſelf at the time, but to give an opportunity to the plaintiff's counſel to ſee if there were any ground upon which the action could be ſuſtained; but none has been or can be ſtated. It is clear, that the delivery of the note to the wife veſted the intereſt in her huſband; and as he permitted her to carry on trade on her own account, and this was a tranſaction in the courſe of that trade, if ſhe had indorſed the note in the name of her huſband, I am not prepared to ſay that that would not have availed; as many acts of this nature may be done by a power of attorney; and the jury might have preſumed what was neceſſary in favour of an authority from her huſband for this purpoſe. But the indorſement being in her own name, it is quite impoſſible to ſay that ſhe could paſs away the intereſt of her huſband by it. And this is not like a note payable to the order of a fictitious perſon, to whom no intereſt can paſs; but here the intereſt paſſed to the huſband. Neither is there any colour for ſaying that the plaintiff can recover upon the money counts. No money paſſed between theſe parties."

So, the executor of a *feme covert*, who lived apart from her huſband, and traded as a *feme ſole*, is not liable to be ſued at law for debts contracted by the wife during her coverture, whilſt living in a ſtate of ſeparation.

Thus, in the caſe of *Clayton* v. *Adams*, (*f*) executor of *Mary Byrne*, which was an action of *aſſumpſit* againſt the defendant, as executor of *Mary Byrne*, for goods ſold and delivered to her. Plea, that *Mary Byrne*, at the time of making the ſuppoſed pro-

(*f*) 6 *Term Rep.* 604. Vide Poſt, *tit.* Contracts by a Feme Covert, ſole Trader.

miſes, was *covert* of one *Arthur Byrne.* Replication that *Mary Byrne,* at the time of making the ſaid promiſes, and from thence until her death, lived ſeparate and apart from the ſaid *Arthur,* and carried on the trade and buſineſs of an haberdaſher as a *feme ſole,* and that the plaintiff never knew of or truſted the ſaid *Arthur,* but dealt with the ſaid *Mary* as a *feme ſole,* and on her credit; and in the courſe of ſuch dealings for goods ſold by him the plaintiff) to her as ſuch *feme ſole,* ſhe made the ſaid promiſes, &c.; that after the death of the ſaid *Mary,* the defendant, as her executor, took and poſſeſſed divers goods and chattels, which were of and in poſſeſſion of the ſaid *Mary* as ſuch *feme ſole,* to the amount of more than the damages ſuſtained by the plaintiff by reaſon of the non-performance of the ſaid promiſes, &c., and whereout as ſuch executor he ought to have ſatisfied the ſame, &c. To this replication the defendant demurred, and the plaintiff joined in demurrer. And, upon argument, the counſel for the plaintiff cited the caſes of *Norton* v. *Turvill* (*g*) and *Huime* v. *Tenant,* (*h*) in which it had been holden in the Court of *Chancery* that the ſeparate eſtate of a *feme covert* was liable for the diſcharge of her bond debt.

But the Court in this caſe gave judgment for the defendant; and Lord *Kenyon,* Ch. J. ſaid, "To the equity caſes that have been cited I fully ſubſcribe: but they cannot govern us in a *court of law.* A *court of equity* can mould intereſts differently from a *court of law*; and can give relief in caſes where a court of law cannot. In order to enable the plaintiff to recover in this action, he ſhould have ſhown that the *feme covert,* when alive, might have been ſued, and that the defendant was poſſeſſed of that property in reſpect of which ſhe was liable: but it does not appear that this could have been the ſeparate property of the wife. And the probate of the will of the wife was abſolutely void: We cannot determine that an action might have been maintained againſt this *feme covert,* without alſo ſaying that ſhe might have been taken in execution: but that would operate as a divorce between the huſband and wife."

In ſome modern caſes (*i*) it has been decided that a married woman living apart from her huſband, and having a ſeparate maintenance ſecured to her by deed, may contract and be ſued as a *feme ſole,*

(*g*) 2 *P. Wms.* 144. (*h*) 1 *Bro. Ch. Cas.* 16.
(*i*) Corbett *v.* Poelnitz *and Wife,* 1 *Term Rep.* 5. *Et vide the ſeveral caſes there cited.*

and

and that her ſecond huſband is liable for debts contracted in the life time of her former huſband, during the ſtate of ſeparation.

But in the more recent caſe of *Marſhall* v. *Rutton*, (*k*) theſe deciſions were reviewed and conſidered; and, after ſeveral arguments at the bar, it was ſolemnly determined by all the judges, that a *feme covert* cannot contract and be ſued as a *feme ſole*, even though ſhe be living apart from her huſband, having a ſeparate maintenance ſecured to her by deed.

Lord *Kenyon* delivered the judgment of the Court in this caſe as follows: "This is an action of *aſſumpſit* brought by *John Marſhall* againſt *Mary Rutton*, for goods ſold and delivered to her, for work and labour, and money laid out to her uſe, and on other general counts. To this the defendant has pleaded her coverture with one *Iſaac Rutton*, who is ſtill alive. The plaintiff has replied, that before the making of the promiſes of the defendant, ſhe and her huſband had mutually covenanted and agreed to live ſeparate and apart; that a ſeparation accordingly took place between them, and that they have continually from thenceforth lived, and ſtill live, ſeparate and apart; that a competent ſeparate maintenance, ſuitable to the eſtate and degree of the defendant, of 200*l. per annum*, was, in due form of law, ſecured to her by deed during the joint lives of her and her huſband, which has been duly paid to her; and that the promiſes in the declaration were made ſubſequent to the ſeparation of her and her huſband. The defendant has rejoined, admitting the ſeparation between the defendant and her huſband before the promiſes, &c. and ſtating the deed mentioned in the replication as being a deed of articles of agreement made between the ſaid *Iſaac Rutton* and herſelf, of the one part, and *Thomas Rutton* of the other part, whereby it was provided that the ſeparate maintenance ſhould be paid for ſuch time only as the defendant ſhould ſuffer the ſaid *Iſaac Rutton* to live ſeparate and apart from her, and the defendant ſhould maintain a chaſte, due, and becoming conduct, and ſhould ſupport and keep *Mary Rutton* and *Elizabeth Rutton*, their two youngeſt children, without any other charge or incumbrance to the ſaid *Iſaac Rutton*, &c., concluding with a traverſe of the ſaid ſeparate maintenance being ſecured to her during the joint lives of her and her huſband. To this rejoinder the plaintiff, having craved oyer of the articles of agreement, has *demurred*, aſſigning various cauſes

(*k*) 8 *Term Rep.* 545. *See alſo* Hatchet *and another* v. Baddeley, 2 *Bl. Rep.* 1079. *a pyſt.*

which

which need not be ſtated; and the defendant has joined in demurrer.

The general queſtion which ariſes on this record, is, whether by any agreement between a man and his wife ſhe may be made legally reſponſible for the contracts ſhe may enter into, and be liable to the actions of thoſe who may have truſted to her engagements, as if ſhe were ſole and unmarried. On account of the magnitude of the queſtion, and from reſpect to the authority and learning of thoſe judges, who in ſome late caſes have holden that a *feme covert* living ſo ſeparate from her huſband, is liable to be thus ſued, we thought this a caſe fit to be argued before all the judges; and it has been twice argued, once in *Eaſter* Term 1798, before all the then Judges, except Mr. *Baron Perryn*, and again in this term (*l*) before all the preſent Judges, except Mr. Juſtice *Buller*, whoſe abſence on every account we had occaſion to lament. And, after a very full conſideration, the opinion of all the Judges, who heard the laſt argument, is, that this action cannot be ſupported.

The ground on which the plaintiff in this caſe reſts his claim, is an agreement between the defendant and her huſband to live ſeparate and apart from each other. That is a contract ſuppoſed to be made between two parties, who, according to the text of *Littleton*, ſ. 168. being in law but one perſon, are on that account unable to contract with each other; and if the foundation fail, the conſequence is, that the whole ſuperſtructure muſt alſo fail. This difficulty meets the plaintiff *in limine*. If it did not, and the parties were competent to contract at all, it would then become material to conſider how far a compact could be valid, which has for its object the contravention of the general policy of the law, in ſettling the relations of domeſtic life, and which the public is intereſted to preſerve; and which, without diſſolving the bond of marriage, would place the parties in ſome reſpects in the condition of being ſingle, and leave them in others ſubject to the conſequences of being married; and which would introduce all the confuſion and inconvenience which muſt neceſſarily reſult from ſo anomalous and mixed a character. In the courſe of the argument ſome of theſe difficulties were pointed out; and it was aſked, whether after ſuch an agreement as this the temporal courts could prohibit, if either party were to ſue in the *Eccleſiaſtical Court* for

(*l*) *Eaſter Term*, 1800.

the

the reſtitution of conjugal rights? whether the wife, if ſhe committed a felony in the preſence of her huſband, would be liable to conviction? whether they could be witneſſes for and againſt each other? whether they could ſue and take each other in execution? And many other queſtions will occur to every one, to which it will be impoſſible to give a ſatisfactory anſwer. For inſtance, it may be aſked how it can be in the power of any perſons by their private agreement to alter the character and condition which by law reſults from the ſtate of marriage, while it ſubſiſts, and from thence to infer rights of action and legal reſponſibilities as conſequences following from ſuch alteration of character and condition? or how any power ſhort of that of the legiſlature can change that which, by the common law of the land, is eſtabliſhed as the courſe of judicial proceedings.

The argument in favour of the plaintiff reſted on this poſition only, as a principle, viz. that where the huſband ceaſes to be the protector of his wife, and is not liable to have any claim made on him for her ſupport and maintenance, it neceſſarily follows that ſhe herſelf muſt be her own protectreſs, make contracts for herſelf, and be reſponſible for them. But if this were a neceſſary conſequence, it would hold in all caſes: but that is not ſo; for if a woman ſhould elope from her huſband, withdraw herſelf from his protection, and live in adultery, he is not by law liable to anſwer for her neceſſaries; and no caſe has decided that the woman is. A wife living apart from her huſband, and who has property ſecured to her ſeparate uſe, muſt apply that property to her ſupport, as her occaſions may call for it; and if thoſe who know her condition, inſtead of requiring immediate payment, give credit to her, they have no greater reaſon to complain of not being able to ſue her, than others who have nothing to confide in but the honour of thoſe they truſt. From the incapacity of a married woman to contract or to poſſeſs perſonal property which may be the ſubject of contract, men and their wives, deſirous of living ſeparate, have found it neceſſary to have recourſe to the intervention of truſtees, in whom the property, of which it is intended ſhe ſhall have the diſpoſition, may veſt uncontrolled by the rights of the huſband, and with whom he may contract for her benefit; but in ſuch property the woman herſelf acquires no legal intereſt whatſoever. Of ſuch truſts Courts of *Equity* alone can take notice; they can cauſe the fund to be brought before them to be applied as in juſtice it ought to be; and in thoſe courts the creditor muſt prefer his claim.

The earlieſt caſes on this ſubject proceed on the ground of the huſband being conſidered as dead, and the woman as being in a ſtate of widowhood, or as divorced *à vinculo matrimonii*, in which light *Rutton* and his wife do not ſtand. And until the caſes of *Ringſtead* v. *Lady Laneſborough*, *Barwell* v. *Brooks*, (*m*) and ſome ſubſequent caſes, which we wiſhed to have re-conſidered, we find no authority in the books to ſhow that a man and his wife can by agreement between themſelves change their legal capacities and characters; or that a woman may be ſued as a *feme ſole* while the relation of marriage ſubſiſts, and ſhe and her huſband are living in this kingdom.

For theſe reaſons our opinion, in conformity with that of all the Judges who heard the laſt argument, is, "that there muſt be judgment for the defendant."

But a contract made by a married woman with the *aſſent* of her huſband, is good; and ſhall be taken as the contract of the huſband. (*n*)

So, where a wife traded by her huſband's conſent, and gave bills for money, and he received the profits. The wife borrowed 100*l.* and died, and a bill was brought againſt the huſband for the money. An iſſue was directed to try, whether the money was borrowed for carrying on the trade; for if it were, the huſband ſhould be decreed to pay it. (*o*)

So, if the wife of *A.* receives 10*l.* to the uſe of *B.* and this comes to the profit of *A.* in a convenient and neceſſary way, though it was without *A*'s order or conſent after, yet *A.* is liable to this debt, and the count or declaration ſhall be of a receipt by the hands of the baron. (*p*)

So, if a *feme covert*, without any expreſs authority from her huſband, contract with a ſervant by deed, the ſervant, having performed the ſervice ſtipulated, may maintain *aſſumpſit* againſt the huſband. (*q*)

So, where a huſband permits his wife to act for him in any department or buſineſs, her contracts and acknowledgements ſhall bind the huſband.

(*m*) *Cited in the caſe of* Corbett *v.* Poelnitz, 1 *Term Rep.* 6.
(*n*) 4 *Vin. Abr. tit.* Baron and Feme. *E. a. pl.* 20. 3 *Bulſt.* 90. 1 *Stra.* 80. *See alſo* Barlow *v.* Biſhop, per Ld. Kenyon, *ante* 173.
(*o*) 2 *Freem. Rep.* 215. pl. 288.
(*p*) *Jenk.* 4. *pl.* 5. (*q*) White *v.* Cuyler, 6 *Term Rep.* 176.

Thus,

Thus, in the caſe of *Emerſon* v. *Blonden*, (*r*) which was an action of *aſſumpſit* for the uſe and occupation of certain rooms in the plaintiff's houſe, which had been let to the defendant.

The defendant and his wife had taken the apartments at a certain rent, the wife had made the bargain, and had agreed to give three months' notice of quitting. Having quitted without notice, the action was brought to recover the three months' rent.

A witneſs for the plaintiff proved a demand of the rent from the defendant's wife, and that ſhe had acknowledged the ſum claimed to be due, and had promiſed payment.

The counſel for the defendant objected to this evidence, as it was admitting the declarations of the wife, and her acknowledgment of debt to charge the huſband.

It was anſwered by the plaintiff's counſel, that the defendant having, in the preſent inſtance, permitted his wife to act for him, in making the agreement, and ſettling the terms upon which the lodgings were taken, that he had thereby conſtituted her his agent for that purpoſe, and ſhould therefore be bound by her acts and admiſſions.

Lord *Kenyon*, Ch. J. ſaid, "that the rule of law had been correctly ſtated by the plaintiff's counſel, that where a wife acts for her huſband in any buſineſs or department, by his authority and with his aſſent, that he thereby adopts her acts, and muſt be bound by any admiſſion or acknowledgement made by her reſpecting that buſineſs, in which by his authority ſhe has acted for him, and that therefore in the preſent caſe her admiſſion of the debt due to the plaintiff on account of the lodging, was competent and admiſſible evidence to charge the huſband."

2. *Of Contracts with a* Feme Covert *during the Baniſhment, &c. of her Huſband.*

We have already ſeen that the contracts of a *feme covert* are in general void, unleſs made with the aſſent of the huſband. But in the caſe of baniſhment, abjuration, or exile, the law conſiders the huſband as civilly dead, and therefore permits the wife to contract, and ſue or be ſued as a *feme ſole*; for it would be unreaſonable

(*r*) 1 *Eſp. Rep.* 142.

that ſhe ſhould be remedileſs on her part, and equally hard upon her creditors, who not having any remedy againſt the huſband, ſhould be without remedy againſt the *feme.* (*s*)

So, an action lies againſt a *feme covert*, though the baniſhment be only for a limited time.

Thus, in the caſe of *Sparrow* v. *Carruthers*, (*t*) which was an action upon a note of 10*l.* given by a *married woman*, who kept a public-houſe, for ſome malt. The defence relied on, was the defendant's coverture. But, upon the trial, the plaintiff proved that her huſband had been transported, and his time was not expired. The queſtion was, whether ſhe was liable. *Yates*, Juſtice, thought that the court muſt conſider the tranſportation as ſuſpending her diſability. A verdict was accordingly found for the plaintiff.

The principle of this rule of law has alſo been extended to caſes where the huſband has reſided abroad, without any probability of returning to *England*, and where the wife has repreſented herſelf, and contracted as a *feme ſole*.

Thus, in the caſe of *Derry* v. The Dutcheſs of *Mazarine*, (*u*) which was an action of *aſſumpſit*, brought againſt the defendant, for wages and money lent; the defendant pleaded coverture, and iſſue thereupon. And notwithſtanding there was very ſtrong evidence at the trial, that the Duke of *Mazarine*, the defendant's huſband, was alive in *France*, the jury found for the plaintiff; becauſe the *Dutcheſs* had lived in *England* for twenty years as a *feme ſole*, and had contracted continually as ſuch; and he, who was her huſband, was *an alien enemy*. It was moved, on behalf of the *Dutcheſs*. that this verdict was againſt evidence and law, for a *feme covert* cannot be ſolely charged for debts and contracts, without divorce and alimony, although the huſband be a foreigner. But by *Holt*, Ch. J. when the huſband is an alien enemy, and under an abſolute diſability to come and live here, the law perhaps will make the wife of ſuch an huſband chargeable as a *feme ſole* for her debts and contracts.

(*s*) *Bro. Abr. tit.* Baron et Feme, *pl.* 66. *Lady Belknap's caſe*, 1 *H.* 4. 1. *p.* 12. 2 *H.* 4. *f.* 7. *a. Co. Lit.* 132. *b.* 133. *a.* 1 *Rol Rep.* 400. *Mo.* 85. 1 *Bulſt.* 140. 3 *Bulſt.* 188. *Bac. Abr. tit.* Baron & Feme, *M.*

(*t*) Coram Yates, Juſt. on the Northern Circuit, cited in 1 *Term Rep.* 6.

(*u*) 1 *Ld. Raym.* 147. *But ſee* 2 *Salk.* 646. 2 *Wils.* 308; *and* 1 *Bos. and Pul.* 339; *where the verdict in this caſe is conſidered as being clearly againſt law, and its equity only made the ground of refuſal of the new trial. And vide the caſes which follow.*

So,

So, in *Walford* v. The Dutchess *De Pienne*, (*v*) which was an action of *assumpsit* for goods sold and delivered. Plea of coverture. The evidence in support of this plea established the fact of marriage; and further, that the *Duke*, who was a foreigner, had gone abroad in the year 1793, and had not since returned; during that interval the *Dutchess* had kept house, and paid bills for goods furnished on her own account, and in her own name; but the witness who proved those facts said, that the *Duke*, on his going abroad, had proposed to remain abroad only for four months, and, as the witness believed, had not abandoned his intention of returning to this country, though he had not yet done so.

Upon this evidence Lord *Kenyon*, Ch. J. ruled, that the defendant was liable. His lordship said, "the present case came within the principle of the old common law, where the husband had abjured the realm. If the husband had been absent for some time, and then returned and paid bills contracted by the wife in his absence, and again left the kingdom, he should hold the wife not liable; but here was a desertion of the kingdom, and an absence of some years;* he was no longer domiciled here, and in the interval his wife was supplied with those articles; if she was not to be held liable for debts contracted under such circumstances, she might be starved."

So, in *De Gaillon* v. *L'Aigle*, (*w*) which was an action of *indebitatus assumpsit* for money paid, &c. The defendant pleaded coverture with *John Martin Harel L'Aigle*. The plaintiff replied, that before the making of the promises and undertakings in the said declaration mentioned, and from thence hitherto, the said *John Martin Harel L'Aigle* lived and resided in parts beyond the seas, out of this kingdom, to wit, at *Hamburgh*; and that during all that time the said *Victoire Harel L'Aigle* lived in this kingdom separate and apart from the said *John Martin Harel L'Aigle*, and followed and carried on the trade and business of a merchant, as a single woman, and a sole trader, to wit, at *Westminster*, &c.; that the plaintiff did not give any credit to the said *John Martin Harel L'Aigle*, but traded and dealt with the said *Victoire Harel* as a *feme sole*, and on her sole credit; and that the said *Victoire Harel* made the said several promises and undertakings in the said declaration mentioned, as such *feme sole* as aforesaid.

(*v*) 2 *Esp. Rep.* 554. *and in another case against the same defendant at the suit of Franks. Ibid.* 587. *S. P.*

* *About three years.* (*w*) 1 *Bos. and Pul.* 357.

To this there was a general *demurrer* and joinder. And in support of the demurrer were cited the cases of *Corbett* v. *Poelnitz*, (*x*) *Gilchrist* v. *Brown*, (*y*) and *Clayton* v. *Adams*. (*z*)

But the court held, that the defendant was personally liable, and accordingly gave judgment for the plaintiff.

Buller, Just. said, "There is another set of cases of a very different nature from those which have been relied on by the defendant; but which are much more applicable to this case. The first of these is the Lady *Belknap*'s case: * now let us see if any sound distinction between that case and this can be maintained. The husband there was banished, but it is not stated whether he was banished for one year, or for five years, or for life: it was held sufficient that he was in banishment at the time when Lady *Belknap*'s contract was made; and I can see but one principle on which the case could have been decided; viz. that the rights known to exist in law between husband and wife were not interfered with by allowing the wife to be taken in execution: as the husband was banished (though it be not stated whether for life or not,) the matrimonial rights during his banishment were at least suspended. In later times the cases have gone further. In *Sparrow* v. *Carruthers*, (*a*) it was shown, in answer to evidence of coverture, that the husband was transported for seven years only, and after that time was expired, he had a right to return, and demand the comfort of his wife, even if she were in gaol; yet the husband being abroad, and not capable of enjoying the matrimonial rights, it was held that the disability of the wife was suspended. In those cases the husband was sent out of the country for his crimes, whereas here the husband has voluntarily abandoned his wife, and, for any thing that appears, never was in *England*, and perhaps never may come here. The wife has traded as a *feme sole*, has obtained credit as such, and ought to be liable for her debts."

Heath, J. "I am of the same opinion. The cases of banishment and transportation of the husband are directly in point. Besides, it is for the benefit of the *feme covert* that she should be liable to an action in such a case as this, otherwise she could obtain no credit, and would have no means of gaining her livelihood. The husband, perhaps, never was in *England*, and never may be, so that this case is not at all like those which proceeded on the ground of a separate maintenance."

(*x*) 1 *Term Rep.* 5. (*y*) 4 *Term Rep.* 766. (*z*) 6 *Term Rep.* 604.
* *Ante* 180. *note s.* (*a*) *Ibid.*

But it seems to be now settled that the But,

But, in the case of *Farrer* v. *The Countess Dowager* of *Granard*, (*b*) which was an action of *indebitatus assumpsit* for the use and occupation of certain ready furnished lodgings. The defendant pleaded coverture; to which the plaintiff replied, that the defendant's husband lived and resided in *Ireland*, and that the defendant lived in *England*, as a single woman; and as such single woman, promised, &c. The court held the replication bad on general demurrer; the terms of it only amounting to a mere temporary absence.

So, in the case of *William Mc. Namara and wife* v. *Fisher*, (*c*) which was a *writ of error* in fact from the Court of *Common Pleas* into the Court of *King's Bench*. The defendant in error having brought an action of *assumpsit* in the Court of *Common Pleas*, for goods sold and delivered, against one of the plaintiffs in error, *Margaret*, the wife of *William Mc. Namara*, she pleaded *non-assumpsit*, and gave her coverture in evidence; which the defendant in error had answered by proving that the plaintiff, *William*, had lived abroad in the *West Indies* for fourteen years, and that the goods were sold to her as a *feme sole*; that the husband was still abroad; and that she received from *Sir Richard Neave* an allowance of a guinea a week, though it was not secured to her by deed. *Eyre*, Ch. J. before whom the cause was tried, being of opinion, that this created a personal responsibility in her, he directed the jury to find for the plaintiff, which they did.

Upon this the present defendant in error signed judgment, and the plaintiff, *Margaret*, was taken in execution. She then brought a writ of error on the judgment, in her own name, and assigned coverture as error in fact. The defendant pleaded *in nullo est erratum*. But, upon the case being set down for argument in *Easter* term, 39 Geo. III. the Court, on the authority of a case in the Year Book, 14 Ed. III. cited by Mr. Justice *Lawrence*, that the husband ought to be joined, quashed that writ of error.

In *Trinity* term 39 Geo. 3. another *writ* of *error* was sued out in the name of the husband and wife, but without the concurrence or knowledge of the husband; and her coverture was assigned as error in fact, as before.

(*b*) 1 *New Rep. C. B.* 80. (*c*) 3 *Esp. Rep.* 18.

The defendant pleaded that the husband lived separate and apart from the wife by his own desire; and that the *feme* had a separate maintenance duly paid to her.

The plaintiffs in error took issue; and upon the trial, the same facts were proved as at the first trial.

Lord *Kenyon*, Ch. J. before whom the cause was tried, said, "I think these parties have mistaken their way very much, by coming into this court. I have frequently heard it laid down on the other side of the *Hall*, and that from very high authority, that the proper course in such a case is to file a bill against a married woman and her trustees in a court of equity; and I remember a cause standing over, because that was not done. Here there are no articles of separation: to say therefore, on this evidence, that there is an end put to the conjugal relation between those parties, is what I dare not say, in point of law or of conscience. I am pretty sure, that Lord Chancellor *Ellesemere* has said something in *Belknap*'s case (if I recollect right, this case is to be found in Co. Litt. *) which has laid down the law in that case; it is an old case, and of great authority, to show that this kind of proceding cannot take place. There is no evidence here to show that this woman has a separate maintenance. On this evidence, every man's wife may be said to have a separate maintenance, because her husband, as far as his abilities go, supplies her with money from time to time. There must be a verdict for the plaintiff."

3. *Of Contracts with a* Feme Covert *sole Trader, &c.*

By the custom of *London* (*d*) if a *feme covert* exercises any trade in which her husband does not at all concern himself, she may be sued as a *feme sole*, in the *City Courts*, for debts contracted in the carrying on of that trade; and if she has not goods that are not her husband's she must be imprisoned till she satisfies her creditors; and as she may be sued, so she may sue as a *feme sole* for debts owing her, in her way of trade, and within the *city*.

But a *feme covert* cannot sue or be sued as a *feme sole* by the custom of *London* in the superior courts at *Westminster*. Her husband must be joined for conformity. (*e*)

* 132. *b.* 133. *a.* (*d*) 10 *Mod.* 6. *Vide* Clayton *v.* Adams, *Ante* 173.
(*e*) Candell *v.* Shaw, 4 *Term. Rep.* 361. Beard *and wife v.* Webb, 2 *Bos. and Pul.* 93.

4. *Of*

4. *Of Contracts with the Wife before Marriage.*

All the *perſonal* eſtate, as money, goods, cattle, houſehold furniture, &c. that were the property and in the poſſeſſion of the wife at the time of the marriage, are actually veſted in the huſband; ſo that of theſe he may make any diſpoſition in his life-time without her conſent, or may by will deviſe them, and they ſhall without any ſuch diſpoſition go to the executors or adminiſtrators of the huſband, and not to the wife, though ſhe ſurvive him. (*f*)

But choſes in action, as debts due to the wife which are to be demanded by action, though they are likewiſe ſo far veſted in the huſband, that he may reduce them into poſſeſſion; yet if he dies before any alteration made by him, they ſhall go to his wife, nor ſhall they, without ſuch alteration, ſurvive to the huſband upon the death of the wife, or he have any right to them, but as he is entitled as adminiſtrator to his wife. (*g*)

The huſband is alſo entitled to whatever his wife earns during coverture. (*h*)

Therefore, a note payable to a *feme ſole* or order, who afterwards marries, becomes the property of her huſband, and ſhe cannot legally indorſe it over to a ſtranger during coverture. (*i*)

But where an eſtate is veſted in truſtees for the ſeparate uſe of the wife, the huſband cannot maintain any action at law againſt a ſtranger for wrongfully receiving the rents and profits thereof. (*k*)

With regard to debts contracted by the wife before marriage, the law has provided, that if a man marries a woman who is in debt to divers perſons, the huſband and wife, during coverture, ſhall be ſued for the debts: but if the wife die, and the creditors have neglected to recover their debts, the huſband ſhall not be charged therewith after the death of his wife: for the debts muſt be recovered in the life-time of the wife. (*l*)

(*f*) *Bac. Abr. tit.* Baron & Feme, C. 3.
(*g*) Ibid. *See alſo Co. Lit.* 351. *a. b. n.* 1. 3. *Mod.* 186.
(*h*) *Bul. N. P.* 136. (*i*) 3 *Wilſ.* 5. *Stra.* 516. 10 *Mod.* 246.
(*k*) Daviſon *v.* Atkinſon, 5 *Term. Rep.* 434.
(*l*) *F. N. B.* 120. *F. Bac. Abr. tit.* Baron & Feme, *F. Com Dig. tit.* Baron & Feme, *N.* & 2 *C.*

5. *Of Contracts for Neceſſaries provided for a Married Woman.*

The huſband, during coverture, is not only liable to the debts of his wife before marriage, but is alſo obliged to maintain his wife, and find her with neceſſaries, as meat, drink, clothes, &c. ſuitable to his eſtate and condition in life. And though the wife has no power to bind her huſband by any contract of hers, even for neceſſaries, without his aſſent *expreſs* or *implied*, yet it is ſettled, that whilſt ſhe cohabits with her huſband, he ſhall be chargeable for all contracts made by her for neceſſaries; and his aſſent thereto ſhall be preſumed on account of the cohabitation, unleſs the contrary appear. Such contracts, however, are conſidered in law as the contracts of the huſband, and he alone is chargeable. (*m*)

So, where the huſband leaves his wife, or refuſes to permit her to live with him; or if he treat her ſo ill as to oblige her to depart from his dwelling; in either of theſe caſes the law makes the huſband liable to her contracts for neceſſaries.

Thus, in the caſe of *Bolton* v. *Prentice*, (*n*) which was an action of *aſſumpſit* for goods ſold and delivered to the defendant's wife: the caſe appeared to be that the defendant and his wife had formerly lodged at the plaintiff's houſe, and the plaintiff furniſhed her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and ſuſpecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever truſting her again.

After this the defendant and his wife cohabited together for a year, when without any cauſe appearing, he left her, locked up her clothes, and upon her finding him out, refuſed to admit her, and ſtruck her, and declared he would not maintain her, or pay any body that did. In this diſtreſs ſhe borrowed clothes of her friends, and applied to the plaintiff, who furniſhed her with neceſſaries according to the defendant's degree; which the defendant refuſing to pay for, this action was brought; and upon trial the jury found for the plaintiff.

Upon motion for a new trial, the court held that the verdict was right; for whilſt they were at the plaintiff's, there was a particular reaſon for the particular prohibition; yet the cauſeleſs turn-

(*m*) *Vide* Manby *v.* Scot, 1 *Sid.* 128, 9. 1 *Lev.* 4. 1 *Mod.* 128. 1 *Salk* 118. *Com. Dig. tit.* Baron & Feme, *Q. Bac. Abr. fame title, H.*

(*n*) 2 *Stra.* 1214.

ing

ing her away deſtitute afterwards, gave her the general credit again: and if a huſband ſhould be allowed, under the notion of a particular prohibition, to deſtroy her obtaining credit in one place, he may in the ſame manner prevent it with all people ſhe is acquainted with. He appears to be a wrong doer, and therefore has no right to prohibit any body. They diſtinguiſhed this caſe from that of *Manby* v. *Scott*, 1 Sid. 109, for there the wife was guilty of the firſt wrong in eloping.

So, in the caſe of *Thompſon* v. *Hervey*, (*o*) which was an action brought againſt the defendant for lodging and neceſſaries for his wife, during her reſidence at *Briſtol*, (which her health abſolutely required;) wherein a verdict had been given for the plaintiff, againſt Mr. *Hervey*. It appeared from Lord *Mansfield*'s report of the evidence that ſhe had herſelf paid part of the money, *viz.* what was due to the plaintiff for the former part of the time; and that ſhe had a penſion, *during pleaſure*, from the crown determinable at the will of the crown, of 300*l.* a year, granted to her in her own name, but not by any agreement or otherwiſe appropriated at all to her own uſe: that at her return from *Briſtol*, her huſband ſhut his doors againſt her; that Mr. *Hervey* had never made or agreed to make any ſeparate allowance to her, or had contributed any thing towards her ſupport, ſince he had ſo ſhut his doors againſt her; nor had ſhe any uſe of his table, ſervants, or equipage: and there was evidence given of his being reputed to have an income of about 1800*l. per annum*.

The Court held, that the huſband was liable to this action; and ſaid: "Here is no agreement for a ſeparation: but he has ſent her adrift, by ſhutting his doors againſt her. He allows her no ſeparate maintenence, nor any ſupport at all. And there is no pretence of this lodging and ~~and~~ other ſupport, provided for her by the plaintiff, being improper for her degree and condition of life. And as ſhe had no maintenance from her huſband, nor admittance into his houſe, ſhe was obliged to procure lodging and maintenance ſomewhere elſe. Every man is obliged to maintain his wife. The penſion is only a voluntary grace and bounty of the crown, and only during the pleaſure of the crown; not what any creditors of hers even for her neceſſary ſubſiſtence ſuitable to her degree and rank of life, can be ſuppoſed to give her credit upon."

So, in the caſe of *Robiſon* v. *Goſnold*, (*p*) where it appeared that a huſband diſcovering his wife to be a very lewd woman, *went away*

(*o*) 4 *Bur.* 2177. (*p*) 6 *Mod.* 171. 1 *Salk.* 119. *S. C.*

from her; and she, after having lived several years with an adulterer, was received into the plaintiff's house, who entertained her as the husband's wife. And this action being an *indebitatus assumpsit* against the husband for lodging and dieting the wife. *Holt*, Ch. J. at *nisi prius*, held, that let the woman be ever so vitious, yet, while she will cohabit with the husband, he is bound to provide necessaries for her, and is liable to an action of such as furnish her with them, for his bargain was to take her for better for worse. In like manner it is, if the husband turns his wife away for her wickedness, he remains still chargeable for her necessaries. But if the wife leaves her husband, they that trust her after it is notorious that she has left him, do it at their peril, and shall not thereupon charge the husband.

And he seemed to be of opinion, that if a wife had run away from her husband, and contracted debts, and after the husband received her, or came after her, and laid with her but for a night, that would make him liable to the debts. Like the case where a wife elopes with an adulterer, though she thereby forfeits her dower, yet if the husband will of his own accord receive her again, she shall have her dower.

So, in the case of *Harris* v. *Morris*, (*q*) which was an action of *assumpsit* brought to recover a sum of money, claimed by the plaintiff for meat, drink, and other necessaries, furnished to the defendant's wife.

The plaintiff's counsel stated, that the wife having been turned out of doors by the defendant, had taken shelter with the plaintiff; were she was entertained, and furnished with necessaries.

The defendant denied that she was turned out; but relied on her having been seen in improper familiarities with a person living near her house, though he could produce no proof of actual adultery: That she had formerly eloped for adultery, and been in the *Magdalen Asylum;* but that he had afterwards taken her back: that he had advertised her in the newspapers, and cautioned persons from trusting her on his credit: lastly, that he was a journeyman tradesman, and incapable of making her any allowance.

In answer to the last matter relied on by the defendant, it was proved, that the defendant had said, that his wife had ten guineas a year, independent of him; and that he could allow her 5*s. per* week addition. This was pressed by the plaintiff's counsel, as having

(*q*) 4 *Esp. Rep.* 41.

ing been ruled by Lord *Mansfield*, to be evidence of the husband's ability to that extent.

Lord *Kenyon*, Ch. J. said: "The defendant has urged several matters in bar of this action; but none appear to me to amount to a legal defence. With respect to her having been formerly guilty of adultery and having been in the *Magdalen Asylum*, though an adulterous elopement will prevent the husband from being liable for articles furnished to the wife during the term of her elopement, that is no answer now. The husband has taken her back; and she was from that time entitled to dower: she was *sponte retracta*, and of course entitled to maintenance during coverture, if her husband turned her out of doors.

The next defence is, that he advertised her in the newspaper, and forbid persons to trust her: that cannot avail him; for if he put her out of doors, though he advertised her, and cautioned all persons not to trust her: or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessaries furnished to her; for the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expences.

With respect to the offer of five shillings *per* week, I agree with what my Lord *Mansfield* has said, "that it is evidence to go to the jury of the husband's liability; but the jury ought to consider the terms upon which it was offered." A juror was withdrawn by consent.

So, in the case of *Hodges* v. *Hodges*, (*r*) which was an action of *assumpsit* brought by the plaintiff (who was the son of the defendant) to recover a sum of money for the board and lodging of his mother, the defendant's wife. The plaintiff's case was, that the wife had been compelled to leave her husband's house in consequence of gross ill-treatment and cruelty. Evidence was given to this effect; but it appeared, that she had voluntarily left the defendant's house, though it proceeded from apprehensions of his ill-treatment and barbarity.

It was contended, for the defendant, that though in case the husband turns the wife out of doors, he sends with her credit for necessaries, the rule of law did not apply, where she voluntarily quitted it.

(*r*) 1 *Esp. Rep.* 441.

Lord

Lord *Kenyon*, Ch. J. said, "That where a wife's situation in her husband's house, was rendered unsafe from his cruelty or ill-treatment, he should rule it to be equivalent to a turning her out of the house, and that the husband should be liable for necessaries furnished to her under those circumstance."

So, in the case of *Ewers* v. *Hutton*, (*s*) which was a similar action to the last: And it was proved, that the defendant had treated his wife with much barbarity, and turned her out of doors: that the plaintiff received her into his family, and furnished her with necessaries; for which the present action was brought.

There was also evidence given, that some time after the wife had been turned out, she returned and rung at the bell: the defendant went down to the door, and refused to admit her.

It was proved, that the wife had had between 3 and 400*l.* fortune when she married.

The defence was, that the absence of the wife, for part of the time, was an elopement; as she might have returned to her husband's house: 2dly, That a separate maintenance was secured to her some time after her leaving her husband's house. To prove which, the defendant gave in evidence a deed of separation executed by the husband and wife; but it was not executed by the wife's trustee, who was a party to it.

Lord *Eldon*, Ch. J. said, "There was no doubt of the law, that where a husband, either from ill-treatment, compelled his wife to leave his house, from motives of personal safety, or turned her out of doors, that any person who afforded her protection, and furnished her with necessaries correspondent to his rank and situation in life, could compel the husband to pay for them, but that in ascertaining what suited his circumstances, the fortune which the wife brought could not enter into the consideration: the jury were to regulate their verdict by what the husband's circumstances were when the separation took place.

As to the question of elopement, it did not appear clearly, whether the term *elopement* in the books, meant an adulterous elopement or not: here there was no imputation of an adulterous elopement: but it was settled in a case in Lord *Raymond*'s Reports (*t*) to which

(*s*) 3 *Esp. Rep.* 255.

(*t*) *I have not been able to find the case alluded to by his lordship in Lord Raymond's Reports. And see the cases of* Child *and others v.* Hardyman, *post*,

which he ſubſcribed, that if the wife had eloped, and afterwards ſolicited to be received again, and the huſband refuſed to receive her, from that time he was bound for neceſſaries furniſhed to her; and that ſeemed to be the caſe, taking it even to have been a voluntary elopement by her.

As to the deed of ſeparation produced, it was waſte paper, it was binding in no degree; it was executed by the huſband and wife; but the wife had no will of her own; ſhe could execute no deed; ſhe could not covenant with her huſband; ſhe could only contract by the means of a truſtee, who became bound for the performance of what ſhe contracted to do: here he had not executed the deed. The huſband could not therefore be ſued; and the deed was of no avail."

His lordſhip therefore concluded with obſerving, "that the wife having ſolicited to be received into the defendant's houſe and being refuſed by him, he was bound to provide her with neceſſaries; and that the deed of ſeparation furniſhed him with no defence."

So, where a huſband goes abroad and leaves his wife, who dies in his abſence, a third perſon who voluntarily pays the expences of her funeral (ſuitable to the rank and fortune of the huſband) though without the knowledge of the huſband, may recover from him the money ſo laid out, eſpecially if ſuch third perſon be a relation of the wife.

Thus, in the caſe of *Jenkins* v. *Tucker*, (*v*) where it appeared that the defendant married the plaintiff's daughter; and ſometime after the marriage went to *Jamaica*, leaving her and an infant child in *England*. During his abſence ſhe died; and the action was brought by her father againſt the huſband, to recover the money, which he had expended after her death, in diſcharging debts which ſhe had contracted while her huſband was in *Jamaica*, (by living with her child in a manner ſuitable to her huſband's fortune) and in defraying the expences of her funeral, which were alſo proportioned to the huſband's fortune and ſtation.

The court determined that the huſband was liable. Lord *Loughborough*, Ch. J. ſaid: "I think there was a ſufficient conſideration

poſt, and Govier v. Hancock, *poſt, where it was held that a huſband is not bound to receive his wife after ſhe has been living apart from him in a ſtate of adultery. See alſo the caſes of* Bolton v. Prentice, *ante* 126. Robiſon v. Goſnold, *ante* 187. *and* Manby v. Scott, *poſt* 193.

(*v*) 1 *H. Bl.* 90.

to support this action for the funeral expences, though there was neither request nor assent on the part of the defendant, for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing, and which common decency required at his hands; the money therefore which the plaintiff paid on this account, was paid to the use of the defendant. A father also seems to be the proper person to interfere, in giving directions for his daughter's funeral, in the absence of her husband. There are many cases of this sort, where a person having paid money, which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid: such as in the instance of goods being distrained by the commissioners of the land tax, if a neighbour should redeem the goods, and pay the tax for the owner, he might maintain an action for the money against the owner.

So, *assumpsit* lies against a husband for money lent to his wife upon his *express assent*. (*u*) But such an action will not lie on an *implied promise*, though the money be even laid out in necessaries for the wife. (*w*) And in the first case the money should be stated to have been lent to the husband.

So, in the case of *Stone* v. *Carr*, (*x*) it was held, that though a husband is not bound to provide for the children of his wife by a former husband, yet if he takes them into his house, and they become part of his family, he shall be deemed to stand *loco parentis*, and be liable in a contract made by his wife for their education, &c.

It should be observed, that in all these cases the things supplied to the wife must be proved to be necessaries suitable to the estate and condition of the husband; for if they be not he will be discharged.

Though a husband is bound to provide necessaries for his wife as long as she cohabits with him; or whilst he absents himself from her, or she is obliged to live apart from him on account of his ill usage to her; yet if she *voluntarily* departs from his dwelling and lives apart from him without his consent; or if the husband absolutely

(*u*) 3 *Wils.* 388. 2 *Bl. Rep.* 872.
(*w*) 4 *Vin. Abr.* 119. 126, 7. 1 *Salk.* 387.
(*x*) 3 *Esp. Rep.* 1. *Ib.* 252. *S. P.*

declares

declares his diſſent that ſhe ſhall not be truſted; any perſon having notice of this diſſent, truſts her at his peril; for the huſband is only liable upon account of his own aſſent to the contracts of his wife, of which aſſent cohabitation cauſes a preſumption; and when he has declared the contrary, there is no longer room for ſuch a preſumption. For the wife has no power originally to charge her huſband, but is abſolutely under his power and government, and muſt be content with what he provides, and if he does not provide neceſſaries, her remedy is in the ſpiritual court.

Thus, in the caſe of *Manby* v. *Scott*, (y) where the wife of the defendant departed from him without his conſent; and during her abſence the huſband prohibited ſeveral perſons, and among the reſt the plaintiff, from truſting her: and, after an abſence of twelve years, *ſhe made a requeſt to cohabit again with her huſband, but he refuſed to receive her.* The plaintiff ſold her ſilk and velvet to the value of 40*l.* which were found ſuitable to the degree of her huſband.

It was ſolemnly determined by *eight* judges againſt *three*, that the huſband was not chargeable in this caſe; for the prohibition, here ſtated, took away all preſumption of any conſent of the huſband to the contract, either expreſſed or implied.

So, in the caſe of *Etherington* v. *Parrott*, (z) which was an action of *indebitatus aſſumpſit* for goods ſold and delivered. At the trial before *Holt*, Ch. J. at *Guildhall*, the evidence to charge the defendant was, that the goods were taken up by the defendant's wife to make her cloaths, and that they cohabited together: but on the defendant's ſide it was given in evidence, that his wife was an extravagant woman, and uſed to pawn her cloaths for money to buy drink; that ſhe pawned a ſuit of cloaths, which coſt 7*l.* for 1*l.* 8*s.* and when her huſband redeemed them, pawned them again; that at the time of buying theſe, ſhe had very good cloaths; that ſhe had bought cloaths of the plaintiff before, and her huſband had paid for them; but when he paid for them, *he gave notice to the plaintiff's ſervant, who received the money, that his maſter ſhould truſt her no more, which he promiſed not to do.* And by *Holt*, Ch. J. "If a huſband turns away his wife, he gives her credit wherever ſhe goes, and muſt pay for neceſſaries for her; but if ſhe runs away from him, he ſhall

(y) 1 *Sid.* 109. 1 *Lev.* 4. 1 *Mod.* 128. *S. C.*
(z) 2 *L. d. Raym.* 1006. 1 *Salk.* 118.

not be liable to any of her contracts, for it is the cohabitation that is an evidence of the husband's assent to contracts made by his wife for necessaries. But if the husband has solemnly declared his dissent, that she shall not be trusted, any person that has notice of this dissent, trusts her at his peril after; for the husband is only liable upon account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption; and when he has declared the contrary, there is no longer room for such a presumption. For the wife has no power originally to charge her husband, but is absolutely under his power and government; and must be content with what he provides, and if he does not provide necessaries, her remedy is in the spiritual court. But here were sufficient necessaries provided, and also the husband had forbidden any trusting her, and notice to the defendant's servant usually employed by him in his trade, was a good notice to his master the plaintiff; and he cannot charge the defendant." Therefore he was nonsuited. The learned judge said also, "If a wife takes up silks and pawns them, before they are made into cloaths, the husband shall not be liable for the silks, because they never came to his use: *contra*, if they were made into cloaths, and wore by the wife, and then pawned by her."

But in the case of *Rawlyns* v. *Vandyke*, (*a*) which was an action of *assumpsit* for the lodging of the defendant's wife and children; and for goods sold and delivered to them,

The plaintiff proved the lodging of the parties at his house, and the furnishing of linen-drapery goods to the wife and children of the defendant; which appeared to be necessaries for them.

The defence was, that the defendant and his wife lived separate; that he allowed her ten guineas a week; that the plaintiff *had notice of these circumstances, and not to trust her:* but the notice not to trust her, was said by the plaintiff to have taken place after the bill for the goods had been delivered.

It was further contended, that there was no evidence that the husband had refused to receive her. But it was given in evidence that Mr. *Vandyke*, the defendant, had supported a separate establishment for his wife at *Bath*, where he had visited her once, and at *Osborn*'s Hotel in *London;* and paid the bills at both places.

Lord *Eldon*, Ch. J. said: "The defendant's counsel relies on his discharge from this action, first, on the ground, of his living apart

(*a*) 3 *Esp. Rep.* 250.

from

from his wife; and there being no evidence that he refuſed to receive her. My conception of the law is this: that if a man will not receive his wife into his houſe, he turns her out of doors; and if he does ſo, he ſends with her credit for her reaſonable expences. In this caſe Mr. *Vandyke* has lived apart from his wife, but he has paid her expences incurred in that ſituation in other places, and has therefore given her credit.

The ſecond ground taken by Mr. *Vandyke*'s counſel is, that he gave her a ſeparate maintenance; informed the tradeſman of that fact, and gave him notice not to truſt her. Separation, with a ſeparate maintenance, was formerly held ſufficient to charge the wife, but it is not ſo held now; the wife is not now liable; but it is a different thing to hold the wife not to be liable, and the huſband to be liable. The object of this action is to make the huſband liable. If the huſband gives expreſs notice to a tradeſman not to truſt his wife, he ſhall not be charged for goods furniſhed to his wife: and if a tradeſman has notice of a ſeparate maintenance given to the wife, it is the doctrine of Lord *Holt*, that that ſhall be notice of an expreſs diſſent on the part of the huſband, and he ſhall not be charged; but where the tradeſman's demand is for neceſſaries, it is incumbent on the huſband to ſhow that the tradeſman knew of the ſeparate maintenance.

The queſtion therefore will be, did Mr. *Vandyke* diſſent from furniſhing his wife with the things charged? I am of opinion, that for every thing furniſhed after notice of the ſeparate maintenance, ~~that~~ that amounted to a diſſent; and for thoſe, that the defendant is not liable.

With reſpect to the things furniſhed to the children, I do not lay it down as the law, that where the children live away from the father, that he is liable, becauſe the things furniſhed are neceſſaries; as a father, he has a right to the cuſtody of his children, and may obtain poſſeſſion of their perſons by *habeas corpus*, but where he does not aſſert that right, and ſuffers them to remain with their mother, I think he thereby conſtitutes her as his agent, and authorizes her to contract thoſe debts for clothing and other neceſſaries; but this I think ſhould be left to the jury."

Where a married woman elopes from her huſband, and afterwards contracts a debt, not only the huſband is not liable, but the wife cannot be ſued either alone, or jointly with her huſband.

Thus, in the case of *Hatchett* and another v. *Baddeley*, (*b*) which was an action of *assumpsit* against the defendant by the name of *Sophia Baddeley*, (without any addition) for money due to the plaintiffs as coachmakers for work and labour and materials, &c. Defendant pleaded *non assumpsit*, and also that she was married to one *Robert Baddeley*, her husband, who was then alive. The plaintiffs replied, *protestando* as to the marriage, that the defendant, before the cause of action accrued, eloped from the said *Robert Baddeley*, and hath ever since lived separate from him, and that the work was done on her credit only. The defendant not rejoining in due time, judgment was signed against her for want of a rejoinder: but it was afterwards moved in arrest of judgment that the replication was bad on the following grounds; 1st, Supposing the facts to be true, it does not therefore follow that she is liable to be sued alone. 2dly, It should not have been alledged that she *eloped*, but that she lived in *adultery*. So is *Rast.* 230. pl. 9. in bar of dower, and *Robins. Entr.* 260: 3dly, It should have stated the cause of action to have been for necessaries.

The counsel for the plaintiffs showed cause against the motion, and contended that the replication was good: they said, "Elopement is a well known term in the law, and signifies a wife's departing from her husband and dwelling with the adulterer. *Termes de Ley. Co. Litt.* 32. a. If the wife *elopes*, the husband is not liable to pay for what she takes up on credit. *Langworthy* v. *Hockmore*, Lord *Raym.* 444. No not even for necessaries. *Stra.* 647. 706. S. P. resolved in *Manby* v. *Scott*, if they are separated, though not for adultery. And in *Derry* v. Duchess of *Mazarine*, Salk. 116. whose husband was abroad, the Court contended that they were divorced and refused to relieve her against a verdict.

In support of the rule, the counsel for the defendant argued thus: "The very admission of the fact of coverture destroys the action. If a *feme covert* appears as a *feme sole*, and the plaintiff has judgment against her, she and her husband may set it aside by writ of error alleging the coverture, 1 *Roll. Abr.* 759. *Sty.* 254. 280. The elopement mentioned in the books, is merely a cause of losing the wife's dower, introduced by the statute of 13 Ed. 1. c. 34, and did not exist at common law. It is not incumbent on me to main-

(*b*) 2 *Bl. Rep.* 1079. Sed vide Cox. v. Kitchen, 1 *Bos. and Pul.* 338.

tain

tain that an action lies againſt the huſband for this coachmaker's bill; it is enough that it does not lie againſt the wife alone. It is the creditor's folly to truſt her, and (as is ſaid in *Stra.* 875.) he does it at his own peril."

De Grey, Ch. J. ſaid: "The word *elopement* is not a legal term, nor has any expreſs meaning in the law. It is not to be found in *Bracton*, *Britton*, or *Fleta*; nor is uſed in the ſtatute of *Weſtm.* 2. The *Mirror* indeed has the word *elopa*; but in a different ſenſe: and none of the dictionaries or etymologiſts explain the word, except *Blount* and *Jacob*. Lord *Coke* is the firſt that I remember to have mentioned it, and he ſpeaks in 2 *Inſt.* 435. of a wife's eloping *and* remaining with an adulterer. The modern books never ſpeak of elopement, but in a criminal view. But it is quite indifferent, as to forming my opinion on this caſe, in what ſenſe the word is to be taken. The preſent caſe is not that of a woman having a ſeparate maintenance, and living apart from her huſband by his expreſs permiſſion: but of a wife departing from her huſband's houſe, or if you pleaſe eloping, without his conſent. She is in every view, even in reſpect of dower (unleſs adultery be proved) a *feme covert*; and as ſuch can neither ſue nor be ſued alone. This is the general law. The exceptions to this, are,

1. Local cuſtoms, as in the city of *London*, where a *feme covert*, being a ſole trader, may be ſued. But there the huſband muſt be joined in the action at the outſet, for conformity.

2. The wife of an exile, one abjuring the realm, or perhaps one profeſſed, who are looked upon as dead in law.

3. The ſame law has been extended to caſes, ſomewhat like the the former, as the Ducheſs of *Mazarine*'s caſe, whoſe huſband lived in *France*.

All theſe are by the acts of the huſband; but no act of the wife can ever make her liable to be ſued alone. If ſhe can be ſued, ſhe can ſue, acquire property, releaſe actions, execute deeds, &c. which would overturn firſt principles. On the whole therefore I am clearly of opinion the defendant is not in a capacity to be ſued alone."

Gould, Juſtice. "I think this caſe is not ripe for a general determination upon principles, becauſe, in my opinion, the replication is ill pleaded. *Elopement* is a word of too vague and uncertain a meaning. If adultery is intended by it, it ſhould not be thus in-

finuated, but plainly expreſſed. 6 Edw. III. 39. *Raſtal. Dowers Bar.* e. It is on this I found my opinion."

Blackſtone, Juſtice. "It ſeems to be ſuppoſed by the argument, that if the huſband is not bound to pay this debt, it follows that the wife may be compelled alone. But this is no legal conſequence. I think in the preſent caſe, that it cannot be recovered of either. And I ſee no hardſhip in a man's loſing his money, that avows upon the record, that he furniſhed a coach to the wife of a player, whom he knew to have run away from her huſband. If this were univerſally known to be law, it would be difficult for ſuch women to gain credit; and this would conſequently reduce the number of wanderers. But, be this as it may, I am clearly of opinion, that in no caſe can any *feme covert* be ſued alone, except in the known excepted caſes of abjuration, exile, and the like; where the huſband is conſidered as dead, and the woman as a widow, or elſe as divorced *a vinculo*, Co. Litt. 133. And therefore *Elizabeth Wilmot* whoſe huſband was abroad, when ſhe attempted to ſue alone, *Moor*, 851. did it with the addition of *widow*. The contrary doctrine militates againſt the firſt principles of the *Engliſh* law, which conſiders the woman's powers, nay almoſt her very being, as ſuſpended during the coverture. Her contract is merely void, ſo as to bind herſelf, ſay all the judges in *Manby* and *Scott*. 1 Sid. 120. She and her huſband may plead *non eſt factum* to her bond, *Salk.* 7. 6 *Mod.* 311. 2 *P. Wms.* 144. If judgment be had againſt her, or ſhe be outlawed, her huſband and ſhe may reverſe it by writ of error, *Bro. Abr. Error.* The very forms of the action demonſtrate the ſame thing. If ſued alone ſhe can have no *addition* (as in the caſe at bar) which is in the teeth of the ſtatute of 1 *Hen.* 5. *c.* 5. If ſued by her maiden name it is miſnomer, 6 *Mod.* 311. If by her huſband's name and as *widow*, it is the like. She cannot put in bail without her huſband, *Cro. Jac.* 445. And as the previous ſteps are thus embarraſſed, ſo after judgment the remedy muſt prove defective. No *elegit* can go againſt her lands, elſe this would be a mode of alienation by a *feme covert* without a fine. It would be endleſs to purſue this idea through all its *legal* abſurdities. And therefore I am clearly of opinion for arreſting the judgment."

Nares, Juſtice, concurred in opinion, that no action would lie againſt a *feme covert* without her huſband. Therefore the judgment was arreſted *per totam Curiam*.

So,

So, if husband and wife be separated by mutual consent, and the husband secures to her a separate allowance by deed; and this is generally known in the place where the husband resides, he is not liable for necessaries furnished his wife in a strange place where the circumstances of the separation are wholly unknown.

Thus, in the case of *Todd* v. *Stokes*, (*c*) which was an action brought by the plaintiff, being an apothecary, for medicines found for the defendant's wife. It was proved, that the defendant and his wife had been separated by consent for five years; and that upon the separation the defendant signed articles to certain trustees, by which he obliged himself to allow his wife twenty pounds a year; which he had done accordingly ever after; that the plaintiff, when he furnished the defendant's wife with these medicines, did not know that she was a married woman, &c. And it was ruled by *Holt*, Ch. J. that the defendant was not bound to pay the plantiff's bill. For though the plaintiff had not personal notice of their separation, and though it was not the general reputation in *London*, where the plaintiff lived, that the defendant and his wife were separated, yet since it was the general reputation in the place where the defendant lived, and that for five years past, it was enough to exempt the defendant's wife from being capable to charge the defendant, though for necessaries. But if the wife had come immediately from her husband after the separation, before it could have been publicly and generally known, and had taken up necessaries upon credit, the husband would have been liable.

But if the husband in such case fails to pay the stipulated allowance, he is liable for necessaries furnished his wife.

Thus, in the case of *Nurse* v. *Craig*, (*d*) which was an action of *indebitatus assumpsit* for meat, drink, washing, lodging, and other necessaries, with counts for money lent and advanced, paid, laid out and expended, had and received, and on an account stated.

At the trial, before Sir *James Mansfield*, Ch. J. it appeared in evidence, that the defendant and his wife, having agreed to separate from each other in the year 1802, a deed of separation was executed in the year 1803, between the defendant, who was a taylor in low circumstances, of the first part, his wife of the second part,

(*c*) 1 *Lord Raym.* 444. 12 *Mod.* 244. *S. C.*
(*d*) 2 *New. Rep. C. B.* 148.

and the plaintiff who was ſiſter to the defendant's wife, of the third part, by which the defendant covenanted with the plaintiff, and agreed with his wife that he would permit his wife, to live apart from him, as a ſingle woman, and would ſuffer her to enjoy all the effects then in her poſſeſſion, or which ſhe might thereafter acquire, notwithſtanding her coverture; and aſſigned the ſame to the plaintiff, as her truſtee, and made the plaintiff his attorney to ſue for the ſame in truſt for his wife, and further covenanted with the plaintiff, that he would pay unto his wife, or to ſuch perſon as ſhe ſhould appoint, for and towards her maintenance, an annuity of 13*l.* at the rate of 5*s. per* week, during her life for all ſuch time as ſhe ſhould live ſeparate and apart from him, which ſhe agreed to accept, in full ſatisfaction, for her ſupport, maintenance, and alimony: provided, that if the defendant ſhould pay any debt which his wife, during ſuch ſeparation and payment of the annuity, ſhould contract, it ſhould be lawful for him to withhold payment of the ſaid weekly ſum of 5*s.* until he ſhould be reimburſed: that the defendant's wife upon this ſeparation taking place, went to live with the plaintiff, her ſiſter, and was furniſhed by her with the neceſſaries for which this action was brought; and that the defendant, having for ſome time failed in payment of the weekly allowance ſtipulated by the deed, this action was commenced to recover from him the amount of what had been furniſhed to his wife. In the courſe of the trial the deed of ſeparation having been produced, the learned judge declared his opinion, that the plaintiff could not maintain the preſent action, framed as it was, and accordingly nonſuited the plaintiff.

But a rule *niſi* was obtained for ſetting aſide this nonſuit; and after argument the Court made the rule abſolute. The learned judges, however, not being agreed, delivered their opinions *ſeriatim*, as follow:

Chambre, J. "In general where a ſeparation of huſband and wife takes place by conſent, the obligation to maintain the wife lies upon the huband, unleſs ſhe forfeits her right to that maintenance by her own miſconduct. A proviſion for a ſeparate maintenance is of modern introduction. Lord *Mansfield*, in the caſe of *Corbett* v. *Poelnitz*, 1 Term. Rep. 5. ſtates the origin of this practice: he ſays in the ancient law there was no idea of a ſeparate maintenance; but when it was eſtabliſhed, what ſaid the courts? That the huſband ſhall not be liable even for neceſſaries; and they ſaid ſo, becauſe convenience and juſtice require it. And *Aſhhurſt*, J. ſays,

J. says, that it would be unreasonable to permit the wife to affect the property of her husband, except where he will not allow her necessaries; for which her contracts are the contracts of her husband. Now if reason, justice, or humanity ought to govern in the present case, I think it my duty to consent to the allowance of this action, since all the reasons upon which exceptions to this kind of action have been founded, totally fail in the present instance. I will state the cases. In *Todd* v. *Stokes*, 1 Salk. 116. *Holt*. Ch. J. says, if *baron* and *feme* separate by consent, and she has a separate allowance, it is unreasonable she should still have it in her power to charge him. The case states that the wife had a separate allowance of 20*l*. *per annum*, and it may be presumed that the allowance was regularly paid; but this fact does not rest upon presumption; for, according to the report in *Ld. Raym.* 444, it was averred in the plea that the allowance was paid according to the articles. In *Cragg* v. *Bowman*, 6 Mod. 147. where an action was brought for lodgings supplied to the wife of the defendant, who had parted from him by consent with a separate maintenance, and had lived in adultery, but without the plaintiff's knowledge, the plaintiff was nonsuited; but it is expressly stated to have been proved, that the maintenance was duly paid to her, which confirms the idea that an actual payment of a maintenance is necessary to discharge the husband. The declaration in *Corbett* v. *Poelnitz* also states the payment of the separate maintenance. In this case the object was to show that the wife herself was liable according to the doctrine which then prevailed, for which purpose it was necessary to show that the husband was not liable. And in *Ringstead* v. *Lady Lanesborough*, 1 Term Rep. 6. The defendant having pleaded coverture, the plaintiff, in his replication, stated not only that she had a separate allowance, secured by deed, but that it was dulypaid. So in *Barwell* v. *Brooks*, *Cooke*'s Bank. Laws 29. the replication stated that the separate maintenance was regularly paid. And in the last instance of an action brought against the wife, *viz.* in *Marshall* v. *Rutton*, where it was determined that the wife was not liable, the replication in like manner stated that the separate maintenance had been duly paid. So that, in all these instances it appears to have been thought necessary to lay a foundation for the exemption of the husband, by showing that the maintenance had been duly paid as well as secured. Thus it stands on the authorities. In point of reason I cannot see the least shadow of doubt. The case may be considered as in some measure analogous to an accord

accord and satisfaction, where the accord avails nothing unless satisfaction be made. Of what use is the covenant for an allowance, if the maintenance be not paid? It does not give a credit to the wife; for no action can be brought against her. It is to supply her with ready money; for if she have a provision which is duly paid, she will have the means in her hands of acquiring all the necessaries of life suitable to her degree. If tradesmen give her credit, it is their own fault; they can neither sue her nor the trustee; and if the mere covenant exempt the husband, a person who has provided clothes or meat for the wife may be compelled to seek his redress in the court of equity, and in the mean time the wife must starve. It is unreasonable in the highest degree to consider that as a ground of exemption which the law itself would impose. In the present case the inconveniencies of the doctrine contended for are illustrated in the strongest manner, on account of the smallness of the provision; the allowance is 5*s.* per week. Is this woman to be taken into a court of equity, and to wait the usual period for decisions of this sort? how is she to subsist in the mean time? The inconveniencies indeed might be in some degree the same, though the amount of the provision were greater. No property is conveyed to the trustee; it is a mere personal contract; and if the allowance were a thousand pounds *per annum*, and the husband chose to withhold it, no tradesman could venture to trust the wife, since he could have no reliance on any thing but her honour for being reimbursed, after a dilatory course of proceeding in equity. I think, therefore, that the ground on which the exemption was supposed to be founded, totally fails; and that there is neither reason nor justice to support it. I am therefore of opinion, that the nonsuit ought to be set aside. Whether this will ultimately avail the plaintiff in this action, I will not undertake to say. There may, perhaps, be other grounds of defence: but as the nonsuit rested on the ground that has been stated, and that merely, I think that it ought to be set aside."

Rooke, J. "I have entertained great doubts on this subject; but my present opinion is in favour of the action. The plaintiff being a trustee in the deed of separation, had another remedy; she might have brought an action on the deed. At first I was at a loss how to imply the assent of the husband to the contract of the wife, so as to support the action of *assumpsit* against him; and I thought that it would be hard that the husband should be liable to two actions. But I have got over these difficulties. First, this action is brought for the immediate supply to a woman supposed

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to be in actual neceſſity; and though the plaintiff be the truſtee in the deed, and was therefore entitled to another remedy, yet as the money was to have been paid to her in the firſt inſtance, I think that ſhe was warranted in ſupplying the wife with neceſſaries, and taking her choice of actions for her own indemnity. As to the aſſent of the huſband, I think that the law will raiſe an *aſſumpſit*, ſo as to make him liable; and though by theſe means he becomes ſubject to two actions, his liability has been occaſioned by his own default. If he had paid the annuity regularly, this queſtion never could have ariſen; for the truſtee and the huſband had agreed what ſhould be the *quantum* of neceſſaries. It appears to me that the defendant has given ſentence againſt himſelf by the articles of ſeparation; for it is only provided that he ſhall be indemnified againſt debts which his wife may contract during the ſeparation, and payment of the annuity; ſo that he does not ſtipulate for an indemnity, except during ſuch time as the annuity ſhall be duly paid. On the beſt conſideration which I have been able to give the caſe, I think the nonſuit ought to be ſet aſide."

Heath, J. "The queſtion is, whether a ſeparate maintenance, ſecured by deed to the wife, be ſufficient to diſcharge the huſband from his liability to provide neceſſaries for her, where that maintenance has not been duly paid? Five or ſix caſes have been mentioned by my Brother *Chambre*, in which a ſeparate maintenance has been pleaded, and payment averred; and I cannot help thinking that Lord Ch. J. *Holt*, in the caſe of *Todd* v. *Stokes*, laid a ſtreſs upon that circumſtance; for why ſhould he ſuppoſe that tradeſmen would truſt a wife upon her own credit, unleſs the circumſtance of payment operated upon his judgment. The allowance, without payment, in this view of the caſe, would be totally immaterial. In *Bacon's Abridgement*, *title Baron* and *Feme*, H, it is laid down that if a huſband allow his wife a ſeparate maintenance, he ſhall not be liable during the time he pays ſuch maintenance. Theſe caſes, therefore, in which the payment of maintenance has been ſet forth in the pleadings, and the paſſage to which I have referred in *Bacon's Abridgement*, ſtrongly ſhow the ſenſe of the profeſſion from the time of Lord Ch. J. *Holt* to the preſent hour. As to principle, it is the duty of the huſband to provide neceſſaries for his wife. The queſtion is, whether he diſcharges that duty merely by entering into a covenant with a truſtee for payment of an allowance? If he refuſe to perform that covenant, the wife may be ſtarved before redreſs can be obtained. The common law does not relieve any man from an obligation on the mere

mere ground of an agreement to do something else in its place, unless that agreement be performed. Accord without satisfaction is no plea. In this case the wife is no contracting party to the covenant; she only assents by her signature, and if she had not executed the deed, she would have been equally bound by accepting the maintenance. The case is not varied by the circumstance of the plaintiff being the trustee in the deed. The agreement could have no operation in destroying the husband's liability by transferring the credit to the wife, unless accompanied by payment; she cannot be in a worse condition than if she cohabited with her husband. Now in the case of cohabitation, the husband would be liable for necessaries, unless he supply his wife with money to furnish herself; for his assent to her contracts must either be express or implied. In the case of *Morton* v. *Withens*, Skin. 348, the defendant and his wife lived in the same house, and the wife had a separate allowance of 50l. *per annum* for her clothes. The action was brought for goods furnished to the wife; and *Treby*, Ch. J. said, 'that if the goods were furnished upon the credit of the husband, the plaintiff was entitled to recover, if the goods were suitable to the quality of the wife, he not having had notice of the allowance; but if he knew of the differences between the husband and wife, and sold the goods only to ruin the husband, the latter should not be chargeable;' but it having been proved that the goods were used by the wife in the presence of the husband, the jury found a verdict for the plaintiff. This was a case where the husband and wife lived in the same house, and the latter had been supplied with money, yet the assent of the husband was implied from his having seen his wife make use of the goods. In the present case, where the husband and wife are separated, and no money has been given to supply the wife with necessaries, the consent of the husband may be much more strongly implied. In the case of *Manby* v. *Scott*, which is best reported in 1 *Sid.* 109. it was said that a general prohibition to all persons to supply the wife with necessaries is void. But if such a covenant as this, without payment, be sufficient to exempt the husband from his liability, it would have the same effect as a general prohibition. At common law the wife may have recourse to any friend for necessaries, if the husband refuse her, and the husband is bound to pay for them; for when the law imposes a duty, it raises a promise on the part of the person upon whom it is imposed, to discharge it. All deeds of separation suppose the husband's liability, for they all contain a covenant to indemnify him against the wife's debts. To suppose that a woman who is parted from

her husband, under an agreement for a separate maintenance, is not by law entitled to charge her husband with payment for necessaries, when he withholds the stipulated allowance, shocks my humanity and revolts my reason."

Sir *James Mansfield*, Ch. J. "I differ from my three Brothers in this case; but I have this satisfaction, that if my opinion be wrong, it will be of no consequence, since the opinion of my Brothers must prevail, and justice will be done. After giving to the subject the best consideration in my power, I cannot but entertain the same opinion now which I held at the trial. In the first place I think that a general provision for the separate maintenance of the wife, whether the husband pays or not, deprives the wife of the advantage of the common law, and prevents the husband from being sued, either in *assumpsit*, or *debt*, for necessaries furnished for the wife. And I also think in this case, that if the general law were not so, this action could not be maintained; because the person who supplied the necessaries was the very person with whom the covenant was made, and must therefore be presumed to have trusted the wife, on the credit of the deed. Not that I think this makes any difference in point of law, but with respect to the remedy there is this difference, that the plaintiff has a short remedy by action on the covenant; whereas, in other cases, the person furnishing the necessaries would have no remedy, but must trust to the honour of the wife. Every man who gives credit to a married woman living apart from her husband, gives credit to her representations; unless he happens to be personally acquainted with the articles of separation. An objection has been raised to the legality of the covenant in this deed; but such covenants have been so long supported, both at law and in equity, that it is impossible now to give weight to the argument. The covenant contained in this deed, therefore, must be considered as valid. Here the husband and wife separate, and the husband covenants with the present plaintiff to pay five shillings *per* week by way of maintenance, to his wife, and the mode of payment is either to the wife herself, or to such person as she shall appoint. Upon failure of payment, there is no doubt that the plaintiff may maintain an action on the covenant. This mode of covenanting to pay so much money is not uncommon; sometimes the provision is made by settling an estate with power of entry; sometimes by setting apart money in the funds; but there is no difference with respect to the husband between one mode and the other; one may be a better security than the other, but in each case the husband is to pay the money, and he

he parts with ſome portion of his property for a ſeparate maintenance for his wife. In all theſe caſes the perſon who gives credit to the wife is without remedy; the wife herſelf is without remedy. If an ejectment be brought for lands, the demiſe muſt be by the truſtee; money in the funds muſt be ſold by the truſtee. An action of covenant muſt be brought by the truſtee. The only way, therefore, by which the wife can compel payment, muſt be by proceeding in equity, and though it may ſeem ridiculous to ſend her to a court of equity to compel payment of ſo ſmall a ſum as 5*s. per* week, yet the rule muſt be the ſame whether the ſum be great or ſmall. It ſeems to me that when agreements of this ſort are entered into, the huſband is bound to pay the ſum for which he covenants, and no more; to that extent he muſt pay, though it ſhould amount to three times as much as his wife's maintenance. The effect is to make the ſeparate proviſion the ſeparate property of the wife. She may mortgage it. If ſhe ſave any thing and die, ſhe may diſpoſe of it by will, without conſent of her huſband. This has been long ſince determined in equity. By theſe means ſhe has, in a certain manner, eſtabliſhed by deed a ſeparate fortune in herſelf. She lives by herſelf. If then perſons under theſe circumſtances truſt her with ſuch a proviſion in her hands, can they in general be conſidered as truſting her on that rule of law, that a huſband, in conſequence of his obligation to provide for his wife, is preſumed to aſſent to the ſupply of neceſſaries? When he has made a diſtinct proviſion, his aſſent to any other mode of proviſion I cannot preſume, much leſs can I find a ground in any decided caſe, for ſupporting a different mode of proviſion than that which is contained in the deed. Where I ſee a covenant to pay a ſpecific ſum, I cannot find a ground in law for ſupporting an *aſſumpſit* on the preſumed aſſent of the huſband. I forbear to cite caſes, becauſe many are to be found in every equity report which ſhow that this is the ſeparate fortune of the wife, that ſhe may diſpoſe of it as ſhe pleaſes. A difficulty has occurred to me with reſpect to the queſtion of payment, which I have not been able to get rid of. It is ſuppoſed that, notwithſtanding the proviſion is a ſeparate maintenance and fortune to the wife, yet, unleſs the huſband pays, the common law right ariſes. I have endeavoured to ſatisfy myſelf how long payment muſt be delayed before the common law right ariſes; ſometimes payment is to be made half-yearly; where it is to be made out of eſtates, it is according to the reſervation of rents. Theſe are ſometimes quarterly, ſometimes half-yearly. How long muſt it be after the end of the quarter, or half-year, before the common law right ariſes;

ariſes; is it to be a week, a fortnight, or a day? The wife muſt have meat and clothes from day to day. If it ariſes upon non-payment, and payment ſhould be delayed for a month, thoſe who give credit to the wife in the mean time muſt truſt her on the common law right, and if an action were brought for neceſſaries, the jury might think that three times as much ought to be allowed as the ſum agreed upon. Suppoſe part only to be paid, to what extent is the huſband liable to be charged? It may be ſaid that theſe difficulties are occaſioned by the huſband breaking his covenant. But there is another difficulty, if the common law right ariſes upon non-payment. Does the covenant ever revive again, or is it entirely gone? I ſhould think that it is entirely gone. If the huſband once become ſubject to pay for neceſſaries, in conſequence of not paying the ſtipulated maintenance, when is the covenant to revive again by payment of the ſtipulated ſum? Theſe certainly are difficulties, but without theſe I ſhould be of opinion, on the general ground, that where a proviſion is ſecured to the wife as her ſeparate property, and ſhe lives as a *feme ſole*, the perſons truſt her upon her own credit. The protection given to the huſband againſt the debts of the wife, is merely a power to retain ſo much as he ſhall be obliged to pay; but this is no ſecurity, for a jury may think that five times as much ought to be recovered for neceſſaries as the amount of the ſum ſtipulated. In common caſes there is a covenant on the part of the truſtees, to indemnify the huſband againſt all debts of the wife, ſo long as they ſhall live ſeparate. But if the huſband, in ſuch a caſe as this, be obliged to pay debts of the wife, that covenant ought to be confined to the time during which the huſband ſhall continue to pay the maintenance, and it ought to be expreſſed, that if the huſband delayed payment for ſuch a time, he ſhould be liable to pay thoſe who truſted his wife for neceſſaries. There ought alſo to be ſome proviſo to guard againſt the doubt whether the covenant was to be entirely done away, or only ſuſpended by non-payment. As this action is brought by the truſtee, no difficulty can ariſe reſpecting any other action. But ſuppoſe ſome other perſon had ſupplied the neceſſaries and brought the action; according to the doctrine, that payment of maintenance is neceſſary to exempt the huſband, the plaintiff muſt have recovered for neceſſaries. Then if the truſtee had brought an action on the covenant for non-payment of maintenance, could the firſt action be pleaded in bar? If not the huſband would be liable to two actions, though the object of the deed was to make him liable only to one, and to relieve him from all other obligations. Where a woman is put into a

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ſituation with reſpect to certain property as a *feme ſole*, no credit is given to the huſband, but thoſe who ſupply the wife truſt only to the ſeparate fortune which they know that ſhe has. Nor can any aſſent of the huſband, as it appears to me, be implied, where he has executed a deed covenanting to pay a certain ſtipulated ſum; for I cannot imagine that he could mean to make himſelf liable to any other payment. In this particular caſe, however, it ſeems quite impoſſible to ſay that the huſband has aſſented to raiſe any implied *aſſumpſit* to pay the plaintiff upon any other contract, but that which is contained in the deed by which he covenants to pay her a certain ſtipulated ſum. Suppoſe the huſband had known that his wife lived with the plaintiff, could it have entered into his mind that he was to pay more than the ſum mentioned in the deed? This would be not only to imply an *aſſumpſit* without ground, but directly contrary to the fact: it would be implying an engagement of one ſort, when there is another engagement totally contradictory to and inconſiſtent with it. It has been ſuppoſed that it would be hard upon the wife, if this action could not be ſupported; that hardſhip I do not feel. In the firſt place, the plaintiff truſted the wife when ſhe had a remedy in her own hands, and ſhe could have no difficulty in truſting the wife to the extent of the money which ſhe was entitled to recover; but it may be obſerved in general, that whoever truſts a married woman, truſts to her honour only. If the wife ſays that the money has not been paid, you muſt depend upon her word for the truth of the aſſertion; you muſt depend upon her honour for making uſe of the remedies againſt her truſtees to compel the payment. And if the money be paid to the wife, the creditor muſt truſt to her honour for paying it over to him; for I know of no remedy by which ſhe may be compelled to do ſo. A court of equity has never gone the length of charging the ſeparate eſtate of a married woman, except on the ground of agreement. Where the wife has agreed to ſell, the Court will compel the ſale. *Grigby* v. *Cox*, 1 Veſ. 517. Or if ſhe enter into a joint bond with her huſband, the Court will charge the rents and profits of her eſtate with payment. *Hulme* v. *Tenant*, 1 *Brown*, 16. All theſe depend on agreement, but I know of no caſe where, on the mere ground of things being ſupplied to the wife, a court of equity has compelled her to pay thoſe who have truſted her; and it is quite clear there is no remedy at law. It is not only in this caſe, therefore, where payment of maintenance has been withheld, that credit muſt be given to the equitable rights of the wife, and to her honour for enforcing them, and applying the money in payment

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of her debts. I admit, that the practice of averring the payment of the ſeparate maintenance in pleading, ſhows the apprehenſion either that the payment was neceſſary, or at leaſt that it made the caſe ſtronger. But the language of the caſes themſelves impreſs on me a different idea of the opinions of the Judges who decided them. In *Todd* v. *Stokes*, though payment had been made, nothing is ſaid upon the ſubject. The language of Lord *Holt* is, " if *baron* and *feme* ſeparate by conſent, and ſhe has a ſeparate allowance, it is unreaſonable ſhe ſhould have it ſtill in her power to charge him." Now what is a ſeparate allowance, but an agreement for an allowance? He goes on, " and it is not to be preſumed but tradeſmen that deal with her truſt her on her own credit, and not on the credit of her huſband." Did Lord *Holt* ſuppoſe, that if the huſband omitted to pay the allowance for a month, that he might be charged? If ſo, the tradeſman would not truſt the wife on her own credit, but on the credit of the general law. Neither in *Salkeld* or Lord *Raymond* is any reliance whatever placed on the circumſtance of payment. According to the report of the ſame caſe in 12 Mod. 244. the ſecond reſolution was this, " that if huſband and wife part by conſent, and the huſband ſecure her an allowance, it is in conſideration that he ſhould not be charged any more by her; and it is unreaſonable he ſhould be charged for victuals or phyſic, or other neceſſaries after." What is the meaning of this? As ſoon as the deed is executed, the allowance is ſecured, and I know of no difference between a ſecurity by covenant, by conveyance of lands, or by tranſfer of funds. Is it not clear then, that the perſon who ſtated that reſolution ſuppoſed that ſecuring the allowance put an end to the common law obligation? If payment had been conſidered as neceſſary, it is natural that it ſhould have been added. The terms of the reſolution require that it ſhould only be ſecured. The caſe of *Angier* v. *Angier*, which is to be found in 2 Eq. Ca. Abr. 150. *Gilbert* Eq. Rep. 152. and Prec. in Chan. 499. ſtrongly implies that a neglect to pay a ſeparate maintenance would never raiſe a common law obligation againſt the huſband. A bill was brought by the wife's *prochein amy* againſt her huſband, for a ſpecial execution of articles, whereby the huſband was to allow her 52*l. per annum*, ſeparate maintenance, and he had a decree for the arrears and growing payment in 52*l. per annum*; and the Lord Chancellor ſaid, " where a huſband makes a ſeparate proviſion for his wife, he is not chargeable by law for her debts;" but though that were ſo, yet to avoid the expence he might be put to in defending ſuch

ſuits, his lordſhip ſent it to a maſter to ſettle a ſecurity to indemnify the huſband againſt the wife's debts. Here the ſeparate maintenance had been withdrawn for ſome time; yet the Lord Chancellor ſays, where a huſband makes a ſeparate proviſion for his wife, he is not chargeable by law for her debts. In the common ſenſe of the word, when a man executes any ſuch ſecurities as I have before mentioned, he makes a proviſion for her. It may be obſerved, that the Chancellor decreed all the arrears and growing payments to be made, but if the law were as now contended for, ſome inquiry ought to have been made, whether any debts had been contracted by the wife for which the huſband was liable, and a deduction ſhould have been made of the amount: no ſuch deduction, however, was made. Theſe caſes, therefore, when fairly expounded, ſeem to ſhow the payment has never been conſidered as an eſſential circumſtance. According to my own recollection of what has fallen from Lord *Mansfield* upon this ſubject, I have the ſtrongeſt impreſſion of having heard him, over and over again, declare, that where a ſeparate maintenance was agreed upon, it put the parties in a new ſituation, and that the huſband was relieved from any common law obligation, being ſubject to no other than that which was contained in the deed of ſeparation, But my brother *Chambre*'s recollection is different from mine on this ſubject, and I defer to his memory as better than my own. There is one circumſtance, however, which weighs very ſtrongly with me in this caſe, that no inſtance is to be found in which ſuch an action has ever been maintained againſt a huſband who had agreed to make a ſeparate maintenance; and yet there muſt be many caſes in which payment muſt have been delayed beyond the ſtipulated time. I cannot ſay how long theſe deeds may have been in uſe, but they certainly are of earlier date than any of the caſes in our law books, which have been referred to. In 1 Eq. Ca. Abr. a caſe is referred to in *Tothell*'s tranſactions in the High Court of *Chancery*, page 97, to ſhow, that a woman who has a ſeparate maintenance may diſpoſe of what ſhe ſaves out of it by will. That was about the year 1720. The date of the caſe in *Salkeld* is the 8 W. III. And in modern times theſe deeds have been very frequent, yet no inſtance is ſuggeſted of an action like this having been maintained. Theſe contracts for ſeparate maintenance would be of very little uſe if the huſband's exemption depended on payment; for if a huſband puts his wife into a lodging, and pays her a reaſonable ſum for maintenance, that will be an anſwer to an action at common law. It ſeems to me, therefore, in general,

ral, that where a man has entered into a contract, and ſecured a ſeparate maintenance to his wife, the common law obligation is at an end, and the perſons who truſt the wife, truſt her on her own credit. But if that be not ſo under the general law, ſtill I think that where a perſon truſts her, having a deed in his own hands, empowering him to compel payment of a ſtipulated ſum, the court cannot raiſe an *aſſumpſit* by implication in his favour againſt the huſband. I differ from my brothers, but the judgment of the court is that the rule be made abſolute."

Where the wife elopes from her huſband, and lives in a ſtate of adultery, he is not liable for neceſſaries, though ſhe be even deſirous of returning, and offers to live with her huſband.

Thus, in the caſe of *Morris* v. *Martin*, (*e*) which was an action for meat, &c. provided for the defendant's wife. The defendant proved that ſhe went away from him with an adulterer: Sir *Robert Raymond*, Ch. J. held, that the huſband ſhould not be charged for neceſſaries provided for her, though the plaintiff had no notice.

So in the caſe of *Child* and others v. *Hardyman*, (*f*) which was an action for linen ſold to the defendant's wife. Upon *non aſſumpſit*, the delivery was proved. On behalf of the defendant it was proved, that ſhe had lived in a very lewd manner; that one *Nott* frequently came to her, at her huſband's houſe, that they were locked up together in a bed-chamber; and that other indecencies paſſed between them. It was alſo proved, that ſhe ſeveral times went to the houſe of this *Nott*, a gentleman in *Wiltſhire*, who lived within three miles of the defendant's houſe. It did not appear farther than that the huſband diſliked her going and ſtaying at Mr. *Nott*'s: But under theſe circumſtances they continued to live together. Afterwards on the 18th of *October* 1726, ſhe went away from him, and went to *Marlborough*, where ſhe reſided for ſome time. But after leaving her huſband's houſe it did not appear that ſhe ever ſaw Mr. *Nott*, or lived in a lewd manner. After ſome time ſhe ſent *Lucas*, an attorney, to her huſband, to deſire that he would receive her again; the huſband told him, that if ſhe came again ſhe ſhould never ſit at the upper end of his table, nor have the government of the children, but ſhould live in a garret. Then *Lucas* propoſed to him, to make her an allowance, and propoſed

(*e*) 1 *Stra.* 647. *See alſo* 2 *Stra.* 706. 12 *Mod.* 372. S. P.
(*f*) 2 *Stra.* 874, 5.

about 80*l.* or 100*l. per annum*, he being worth about 5 or 600*l. per annum*. But that was not complied with; and afterwards she came to *London*, and bought the linen to the amount of 53*l.*

Chief Justice *Raymond*, was of opinion that the plaintiff should be called. And accordingly he was nonsuited. He held, "if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound. And this had been so adjudged in two or three cases. Indeed if he refuse to receive her again, from that time it may be an answer to the elopement. In this case he does not absolutely refuse to receive her again: but that she should neither sit at his table, nor have any government of the children, but should be kept in a garret; and she deserved no better usage."

So, in the case of *Clivier* v. *Hancock*, (*g*) which was an action of *assumpsit* brought by the plaintiff for the board and lodging of the defendant's wife. The defendant, having committed adultery with a woman of the name of *Bazely* whom he had brought home, treated his wife with great cruelty, and finally turned her out of doors. Then the wife committed adultery, after which she offered to return home, but her husband would not receive her; and this action was brought for her board and lodging subsequent to that time. *Buller*, Just. before whom the cause was tried, was of opinion that the husband was not bound to receive the wife after she had committed adultery, and consequently was not bound to support her; and he directed a verdict for the defendant, with liberty for the plaintiff to move to enter a verdict for him, if the Court of *King*'s *Bench* should be of opinion that the defendant was liable under these circumstances. Accordingly the plaintiff moved to set aside the verdict, on the ground that as the defendant had been the aggressor, and had turned his wife out of doors at a time when there was no imputation on her conduct, he was bound to provide for her, notwithstanding she afterwards committed adultery; that in this respect it differed from the case of the wife being the aggressor, and eloping with an adulterer, in which case the husband was discharged; that it had never yet been determined that under these circumstances the husband was not liable, and that upon principle he was liable.

(*g*) 6 *Term Rep.* 603.

But

But the court ſaid, "That though this preciſe caſe did not appear to have been controverted before, it was probably becauſe the point had not been doubted; and that it muſt be governed by the ſame principle on which it had been determined that the huſband is not liable in caſes where the wife goes away with an adulterer. That this was not a modern rule, but was mentioned by Lord *Coke*, that if a wife go away with an adulterer ſhe loſes her dower. That the queſtion depended upon this, whether the neceſſaries were provided before or after the wife had committed adultery: if after, the action could not be maintained. And that in this caſe if the wife had inſtituted a ſuit in the *Eccleſiaſtical Court* againſt the huſband for reſtitution of conjugal rights, they would not have aſſiſted her." The rule was accordingly diſcharged.

But, in the caſe of *Norton* v. *Fazan*, (*b*) which was an action of *aſſumpſit* for neceſſaries found for the defendant's wife and children. The facts were theſe: Some time previous to the delivery of the goods, the defendant having diſcovered that his wife kept up an adulterous intercourſe, with another man, ſeparated himſelf from her, leaving her in poſſeſſion of the houſe which he had inhabited, together with two children bearing his name. In this houſe ſhe was living in a ſtate of adultery, at the period when the goods in queſtion were delivered. The defendant had made no regular proviſion for his wife. The cauſe was tried before *Eyre*, Ch. J. who was of opinion that if the plaintiff knew or ought to have known that the ſeparation proceeded from the adultery of the wife, the jury ſhould find for the defendant; if not, that the plaintiff was entitled to recover. The jury found a verdict for the plaintiff.

Upon a motion for a new trial, the court were of opinion that the plaintiff was entitled to recover. And *Eyre*, Ch. J. ſaid: "If the defendant in another action brought againſt him by ſome other tradeſman, ſhall be able to eſtabliſh the notoriety of his wife's ſituation, he may defend himſelf. But as the caſe ſtands at preſent this woman appears to have been living in a houſe in which ſhe was placed by the defendant himſelf, together with two children bearing the huſband's name, both of whom were born in wedlock. It is true that ſhe had an adulterous intercourſe with another man, but that was not proved to be known to this tradeſman. If the defendant can bring it home to any other tradeſman who ſhall be in

(*b*) 1 *Bos. and Pul.* 226.

the ſame ſituation as the preſent plaintiff, that he did know or ought to have known the circumſtances under which the wife was living, the defendant may, perhaps, be able to prevent another verdict paſſing againſt him."

Buller, J. "Every caſe on the facts is peculiar to itſelf, and this is ſo different from every other caſe which has been decided in *Weſtminſter Hall*, that I conſider it as anomalous. The verdict is clearly and ſtrictly right. The wife committed adultery for a conſiderable time while ſhe was living with her huſband; he voluntarily yielded his bed to the adulterer and made no proviſion for her. Then what colour of defence is left? knowing of her criminal conduct and having made no proviſion for her, he muſt maintain her as before."

It is obſerved (*i*) where the huſband and wife are ſeparated *a menſa et thoro* by ſentence in the *Eccleſiaſtical Court* the law allows her alimony at the diſcretion of the judge, unleſs ſhe has eloped and lives with an adulterer; and as the common law gives her a writ to recover this, it would ſeem that the huſband is excuſed from the obligation of her contracts. So, where ſhe is ſentenced to a temporary confinement as a puniſhment for ſome crime, the huſband has been held not liable to her agreement, even for neceſſaries, if ſhe is kept in an improper place by the covin of the gaoler. (*k*)

But in the caſe of *Manby* v. *Scott*, (*l*) the judges who argued for the plaintiff laid it down as clear law, that if a wife be priſoner for felony, and the gaoler provides her with food, that the huſband may be charged for it.

6. *Of Contracts made by a Woman living with a Man as his Wife.*

If a man and woman live together, and paſs in the world as huſband and wife, the man ſhall be liable to all contracts entered into by the woman in the ſame manner as he would have been liable if they had been actually married. (*m*)

(*i*) 2 *Stra.* 1214. *n.* 1. 1 *Bl. Com.* 441. Ellah v. Leigh, 5 *Term Rep.* 679.

(*k*) *Vide* Fowles v. Dinely, 2 *Stra.* 1122.

(*l*) 1 *Sid.* 110. *But ſee* 2 *Lev.* 16

(*m*) 12 *Mod.* 372. *Vin. Abr. tit.* Baron & Feme, *D.* b. *pl.* 38. *Comp.* 233.

So, in the case of *Watson* v. *Threlkeld*, (*n*) which was an action of *assumpsit* brought to recover the amount of a quantity of linen-drapery goods, furnished by the plaintiff to a woman who passed for the wife of the defendant.

The plaintiff proved the delivery to the woman at the defendant's lodgings; that he had himself chosen some of the articles for her; that she used his name, and was called Mrs. *Threlkeld* in his presence.

The defence relied on was, that this woman, was not his wife, though she lived with him as such, but was a kept woman, and that that circumstance was known to the plaintiff when the goods were furnished. It was then pressed by the defendant's counsel, that however it had been held, that if a man permitted a woman to use his name and pass for his wife, he thereby subjected himself to the payment of her debts; it had only gone to those cases where the tradesman had not known the real situation of the parties, but believed the woman to be actually married; that it was meant as a punishment on the man, who, by permitting a woman to use his name, had thereby given her a false credit, derived from his situation in life, as passing for his wife; but in the present case no such deceit was practised, no such false colours held out; the plaintiff knew that the defendant was not married, so that he could not look to his credit, but to the woman's own, and that the plaintiff should therefore be nonsuited.

Lord *Kenyon*, Ch. J. "It is certain that if a man has permitted a woman, to whom he was not married, to use his name, and pass for his wife, and in that character to contracts debts, he is liable for her debts; and I am of opinion that he is liable, whether the tradesman who furnished the goods knew the circumstances to be so or not. He gives her a credit from *his* name and cohabitation, and it is not to be supposed that the tradesman could look to the credit of a woman of that description, and not to that of the man by whom she was supported: I shall hold the credit to be given to him, and that he is liable."

His lordship added, "What, however, I have said must not be taken to be the case of a common strumpet, who may assume the name of a person, without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family."

(*n*) 2 *Esp. Rep.* 637.

So, where a woman marries a second husband living the first, the second not being privy to it; *Parker*, Ch. J. said (*o*) that for what she acquired during the cohabitation, he would esteem her as a servant to the second husband, and that he was entitled to the benefit of her labour.

7. *In what Cases Husband and Wife ought to sue and be sued jointly.*

Upon all contracts made with the wife before marriage, the husband and wife must sue and be sued jointly. (*p*)

So, they ought to sue jointly in actions upon *promises*, which arise during coverture, where the wife may have an action for the same cause, if she survives her husband.

Thus, if a *feme covert* has a mill, and one agrees with the husband and wife to grind all his corn at the mill, under a penalty in default thereof, they ought to join; for the action would survive to her. (*q*)

So, if a man promises to give a 100*l.* to the wife of J. S. they ought to join in action for the recovery thereof. (*r*)

So, in an action for any thing due to the wife *en auter droit*, they ought to join: as if they sue for a debt, &c. to the wife as executrix or administratix. (*s*)

But on a promise to pay a husband money due to his wife as executrix, in consideration of his forbearing to sue for it, the husband alone ought to sue (*t*)

8. *In what Cases the Husband may sue alone, or join with his Wife, and when he must sue alone.*

When the wife is the meritorious cause of action, it has been ruled, (*u*) that the husband alone may sue, or the husband and wife

(*o*) 1 *Stra.* 80.

(*p*) 2 *Com. Dig. tit.* Baron & Feme, *V. Y.* Mitchinson *v.* Hewson, 7 *Term Rep.* 348.

(*q*) Demstan *and wife v.* Burwell, 1 *Wils.* 224. *See also* 2 *Wils.* 214.

(*r*) Per Curiam, *Bulst.* 21.

(*s*) *Com. Dig. tit.* Baron & Feme, *V.* 1 *Salk.* 282.

(*t*) Yard *v.* Eland, 1 *Ld. Raym.* 368 1. *Salk.* 117. *Carth.* 462. *S. C.*

(*u*) *Cro. Jac.* 77. 205. 1 *Sid.* 25. 2 *Sid.* 128. 1 *Salk.* 114. *Com. Dig. tit.* Baron & Feme, X.

may

may join, though damages only are recovered: as in *assumpsit* upon an express promise to the wife, after coverture, to pay her 10*l.* in consideration of a cure to be performed by her; the husband and wife may join, or the husband alone may sue.

So, upon a promise to pay 8*l. per annum* to the husband and wife during coverture, they may join; or the husband alone may sue. (*v*)

But when the wife cannot have an action for the same cause, if she survive her husband, the general rule of law is, that the action must be by the husband alone. (*w*)

As, in an *indebitatus assumpsit* on an implied promise to pay for work done by the wife during coverture; the law presumes no promise to have been made to the wife; for she is the servant of her husband; and he is not only at the charge of the materials to carry on the work, but is also obliged to maintain his wife; and therefore it is the law considers the promise to have been made to him only. (*x*)

(*v*) *Com. Dig. tit.* Baron & Feme, *X.*
(*w*) *Com. Dig. tit.* Baron & Feme. *W.*
(*x*) 4 *Mod.* 156. 1 *Salk.* 114. 3 *Salk.* 63. *Carth.* 251. 8 *Mod.* 199, 200. 1 *H. B.* 108.

CHAPTER

CHAPTER III.

Of Contracts with Master and Servant.

FROM the relation subsisting between master and servant, the subject of the present chapter may be considered under the following heads:

1. *What Contracts made by a Servant shall bind his Master.*

2. *In what Cases the Master is entitled to the Earnings of his Apprentice or Servant.*

3. *Of the Servant's liability upon his implied Undertaking to serve his Master with Care and Diligence, &c.*

4. *Of the Contract between Master and Servant for Wages; and of the Servant's Right to a Month's Warning, &c.*

5. *Of the Master's liability to provide Medicine, &c. for his Servant in case of Illness.*

1. *What Contracts made by a Servant ſhall bind the Maſter.*

In general a maſter is liable for acts done by his ſervant in the exerciſe of his official employment. And the reaſon of this liability is ſaid (*a*) to ariſe from the relation ſubſiſting between maſter and ſervant: for, as in ſtrictneſs, every one ought to tranſact his own affairs, and it is by the favour and indulgence of the law that he can delegate the power of acting for him to another; it is highly reaſonable that he ſhould anſwer for ſuch ſubſtitute; and that his acts ſhould be deemed the acts of the principal.

Therefore, where a bailiff or ſervant hath authority from his maſter to buy or ſell goods, &c. for him, he ſhall be anſwerable for the contract made by his bailiff or ſervant relating to the ſale of them. (*b*)

So, where a ſervant uſually buys for the maſter upon credit, and the ſervant buys ſome things without the maſter's order, yet if the trader truſted the maſter he ſhall be chargeable. (*c*)

So, in Sir *Robert Wayland*'s caſe, (*d*) where it was proved, that he uſed to give his ſervant money every *Saturday* to defray the charges of the foregoing week, the ſervant kept the money; yet *per Holt*, Ch. J. "The maſter is chargeable, for the maſter at his peril ought to take care what ſervant he employs; and it is more reaſonable, that he ſhould ſuffer for the cheats of his ſervant than ſtrangers and tradeſmen.

So, in the caſe of *Hazard* v. *Treadwell*, (*e*) where the defendant, who was a conſiderable dealer in iron, and known to the plaintiff as ſuch, though they had never dealt together before, ſent a waterman to the plaintiff for iron on truſt, and paid for it afterwards.

(*a*) *Bac. Abr. tit.* Maſter and Servant, *K.*
(*b*) *F. N. B.* 120. *G* *See alſo Doct. and Stud. Dial.* 2. *c.* 42.
(*c*) 1 *Show.* 95. 3 *Salk.* 34 *Holt's Rep.* 460.
(*d*) 3 *Salk.* 234. *See alſo* Ruſby *v.* Scarlett, 5 *Eſp. Rep.* 76. *S. P.* et poſt. 222. 239.
(*e*) 1 *Stra.* 506.

He

He sent the same waterman a second time with ready money, who received the goods, but did not pay for them. It was ruled, that the sending the waterman upon trust the first time and paying for the goods, was giving him credit, so as to charge the defendant upon the second contract.

So, in the case of *Precious* v. *Abel*, (*f*) which was an action for work done as a farrier in shoeing and physicking the defendant's horse: the defence was, that the defendant, by an agreement with his groom, allowed him five guineas a year, for which he was to keep the horses properly shod, and furnish them with proper medicines when necessary. Ld. *Kenyon*, Ch. J. held, that it was no defence to the action, unless the plaintiff knew of this agreement, and expressly trusted the groom. That if the servant buys things which come to his master's use, the master should take care to see them paid for; for a tradesman has nothing to do with any private agreement between the master and servant.

So, in the case of *Gratland* v. *Freeman*, (*g*) which was an action of *assumpsit* for beer sold by the plaintiff, a publican, to the defendant. On the trial it appeared, that the defendant had been in the habit of dealing with the plaintiff upon credit, and had paid him occasionally when the bill amounted to a certain sum. After paying up all arrears, the defendant told the plaintiff's servant, who brought the beer, that he would run up no more bills with the plaintiff, but would pay for the beer as it came in; and the defence was, that he had paid the money to the servant. Lord *Eldon*, Ch. J. said, "The defendant must show that the master had notice of this change in the mode of dealing." It was then contended by the counsel for the defendant, that this notice having been given to the plaintiff's servant, and the money having been paid to the servant, the master should be bound by it. But his lordship said, "He thought not. It was a change in the usual mode of dealing suggested by the defendant himself; and as he had personal dealings with the master, in a particular mode, notice to the servant alone of a change in that mode would not be sufficient; the defendant must show that the master himself had notice of it, or he could have no defence to the action." The defendant being unable to establish that fact, the plaintiff recovered the amount of his demand.

(*f*) 1 *Esp. Rep.* 350. (*g*) 3 *Esp. Rep.* 85.

But

But where a man gives his servant money to pay for commodities as he buys them, upon a contract or an understanding between the tradesman and the master to deal for *ready* money; if the servant embezzles the money, the master is not liable.

Thus, in the case of *Stubbing* v. *Heintz*, (*b*) which was an action of *assumpsit* for goods sold and delivered. The defendant contracted with the plaintiff to serve him with all kinds of meat at a certain price *per* pound for *ready money*. The cook was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea, used to pay it; in general she paid once a week, on a *Monday* morning; and the defendant always gave the servant the money to pay the bills. This course of dealing continued for a long time, and several successive servants paid the money they received from the defendant as above stated. At length the defendant got another cook, and gave her money as usual, but she did not pay the bills as the others had done, but suffered them to be in arrear 33*l.* 3*s.* 3*d.* She then ran away from the defendant's house, after which the defendant was called upon, for the first time, to pay this sum of money, and on his refusal the plaintiff brought the present action. The defendant also proved, that when his family were absent from town in the summer, a servant, who was left to take care of the house, had meat for her own support from the plaintiff, and paid him for the same, but he never demanded this sum of money from that servant, or mentioned to her that it was owing to him from the defendant.

Lord *Kenyon*, Ch. J. said, "Nothing could be clearer than that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again. But if the master employs his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit. Here the contract between the parties was to deal for ready money: and the plaintiff when he let the bill run on to such an amount, as the sum now claimed, was giving credit to the servant, and not to the defendant. The defendant had not entered into a new contract, but still thought that he was dealing on the same terms as before." A verdict was accordingly found for the defendant.

(*b*) *Peake's Cas. N. P.* 47. *See also* 1 *Show.* 95. *S. P.*

So,

So, in the caſe of *Pearce* v. *Rogers*, (*i*) which was an action brought by the plaintiff, who was a publican, to recover from the defendant the amount of a ſcore for beer, ſupplied the defendant's family. The defendant dealt with the plaintiff for the porter uſed in his family, and was in the habit of paying ready money to the plaintiff for a certain quantity of porter which was allowed for the family; and, in fact, though the beer for which the action was brought had been delivered at the defendant's houſe, it had been carried in clandeſtinely by the maid ſervant, for her own uſe, and that of the defendant's wife's mother; but it did not appear that the plaintiff knew of this circumſtance.

Lord *Eldon*, Ch. J. ſaid, "that to allow ſuch a demand would be to put it in the power of ſervants and tradeſmen to ruin the maſter; that where the maſter was in the habit of paying ready money for part of the goods furniſhed, it was ſufficient notice to the tradeſman that he conſidered thoſe only as furniſhed to his family, to put the tradeſman on his guard, and to make it incumbent on him to ſatisfy himſelf that the goods were really for the uſe of the maſter's family; that where the tradeſman ſuffered his goods to be ſo delivered, and without informing the maſter, if in point of fact they did not come to his uſe, he ſhould hold him not to be liable: that in this caſe, the porter not having been delivered to the defendant's uſe, there was, in his opinion, no pretext to charge him." The plaintiff was accordingly nonſuited.

So, where a tradeſman had had no dealings with the maſter, but with the coachman, to whom the maſter gave money monthly for the purpoſe of buying oats and hay for his horſes; and the tradeſman made no application to the maſter for his demand until a year after the goods were delivered, Lord *Kenyon*, Ch. J. ruled, that the maſter was not liable. (*k*)

But in the caſe of *Ruſby* v. *Scarlett*, (*l*) which was an action brought to recover the price of a quantity of hay and ſtraw ſold by the plaintiff, for the uſe of the defendant's horſes. The plaintiff proved the delivery of a quantity of hay and ſtraw at the defendant's ſtables, and the delivery of bills of parcels; but there was no evidence of his having ever ſeen the defendant, or of his having ever received any orders from him, or that he ever received from him directly any payment or money whatever.

(*i*) 3 *Eſp. Rep.* 214. (*k*) *Eſp. Ni Pri.* 115. 3*d. ed.* (*l*) 5 *Eſp. Rep.* 76.

The

The defence was, that the defendant had given money to his coachman to pay the bills, which he had embezzled. It appeared that the defendant had kept a book with the ſervant; in which were entered the articles procured by the ſervant, and the ſums advanced to him; but there did not appear to be any connection between the ſums advanced to the ſervant, and the demands which he was to pay; but the money was advanced generally.

Lord *Ellenborough*, C. J. ſaid, "The general rule to ſubject the principal to the act of the agent is this. The agency muſt be antecedently given, or be ſubſequently adopted. There muſt, in the latter caſe, be ſome act of recognition; but if I authoriſe a man to obtain credit on my account, and he gets the goods on ſuch credit, unleſs I have paid him, I am myſelf liable: but I go further; for if the goods were taken up, and the money given afterwards to the ſervant to pay, I am inclined to think the maſter liable, if the ſervant has not paid over the money; for he has given the ſervant authority to take up goods on credit. It is therefore material to ſee when the money was given. If the ſervant was always in caſh before-hand, to pay for the goods, the maſter is not liable, as he never authoriſed him to pledge his credit; but if the ſervant was not ſo in caſh, he gave him a right to take up the goods on credit; and I think he would be liable, as the ſervant has not paid the plaintiff, though he might have received the money from the defendant, his maſter."—The jury accordingly found a verdict for the plaintiff.

But where a maſter forbids a tradeſman to deliver any goods except his ſervant pays for them, and goods are afterwards delivered to the ſervant upon credit; the maſter ſhall not be liable if he has paid the ſervant the money for them. (*m*)

So, in the caſe of *Hiſcox* v. *Greenwood*, (*n*) which was an action of trover; it appeared, that the plaintiff's chaiſe having been damaged by the negligence of his ſervant, and without his knowledge, the ſervant had, without acquainting his maſter, taken the chaiſe to the defendant, who was a coachmaker, to get it repaired: the defendant had never been employed by the plaintiff as his coachmaker, or to do any work for him. Some repairs had been done to it to a very ſmall amount. The defendant refuſed to deliver it up till he was paid the amount of his demand, contending that he had a lien on the chaiſe, on account of the work which he

(*m*) *Brownl.* 64. (*n*) 4 *Eſp. Rep.* 174.

had

had done to it. But Lord *Ellenborough*, Ch. J. said, "that the defendant had no right to hold the chaise as a lien. Whatever claim of that sort he might have, he must derive it from legitimate authority: that unless the master had been in the habit of employing the tradesman in the way of his trade, it should not be in the power of the servant to bind him to contracts of which he had no knowledge, nor to which he gave his assent. It was the duty of the tradesman, when he was employed, to have enquired of the principal if the order was given by his authority; but having neglected to do so here, and the master having never employed him, the master was not liable to the demand; and the detainer of the chaise was unlawful."

2. *In what Cases the Master is entitled to the Earnings of his Apprentice, or Servant.*

Whatever an apprentice earns by his labour, whilst he remains in the actual employ of the master, clearly belongs to the master. So, where an apprentice leaves his master's service, and is employed by a stranger, the master is entitled to his wages or earnings, in respect of such employment during his apprenticeship.

Thus, in the case of *Barber* v. *Dennis*, (*o*) where it appeared that the plaintiff had her apprentice taken from her, and put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the plaintiff brought trover. It was agreed the action would well lie, if the apprentice were a legal apprentice, for his possession would be that of his master, and whatever he earns shall go to his master. *Holt*, Ch. J. said, he would understand him an apprentice or servant *de facto*, and that would suffice against the defendant being a wrong doer.

So, in the case of *Eades* v. *Vandeput*, (*p*) which was an action against the captain of a ship of war by the master of an apprentice, to recover wages for the service of his apprentice, who, having been impressed, was detained on board the defendant's ship. The only witness to charge the defendant with knowledge was the apprentice boy himself, who swore that after he had been impressed and carried on board the ship, he told the defendant, the

(*o*) 6 *Mod* 69. 1 *Salk* 68. *S. C.*
(*p*) Mich. 25 *Geo.* 3. *B. R.* 5 *East. Rep.* 39 *n. a.*

captain,

captain, that he was an apprentice, and required his discharge, which was refused. The *Court* were of opinion that the evidence of the boy was sufficient, and that the captain ought to have made enquiry into the truth of what the boy said; for after that information he detained him at his peril; and it was admitted that if the indentures had been produced, the defendant would have been bound to have discharged the boy.

So, in the case of *Curteis* v. *Bridges*, (*q*) it was held, that if the master of one ship takes a servant that belongs to the master of another ship, whatever wages he receives from the *King* upon his account shall be to the use of his first master, being acquired by the labour and industry of his servant.

And by the stat. 2 & 3 Anne, c. 6. s. 17. after reciting, "whereas owners and masters of merchant ships are at great "charge in educating and bringing up the parish children, till "they come to the age of eighteen years, and other voluntary ap- "prentices three years, at which time they are capable to serve "in her Majesty's ships of war; it is enacted, that when such "apprentices shall be impressed, or *voluntarily* enter themselves "into her Majesty's service, the said owners or masters of such "apprentices their executors, administrators, or assigns, shall be "entitled to able seaman's wages for such of their apprentices as "shall upon due examination be found qualified for the same, "notwithstanding their indentures of apprenticeship." And by stat. 31 Geo. 2. c. 10. s. 16. it is declared, "that that act, or any "thing therein contained, shall not extend to, or be construed "to invalidate or make void any indenture whereby any master "is or shall be entitled to have or receive the wages, pay, or other "allowances of money earned by his apprentice, but the same "shall be paid by the *Treasurer of the Navy*, according to such "indenture, as has been usual in such cases; unless such ap- "prentice shall be above the age of eighteen years at the time "when such indenture was made and executed; or unless such "apprentice shall have been hired and rated as a servant to any "commission or warrant officer belonging to any of the ships or "vessels of his Majesty, *such apprenticeship not being then known to* "*such officer*; in which case the wages or pay of such servant "shall be due and payable to such commissioner, or warrant "officer, according to the usual practice of the navy, until such

(*q*) *Comb.* 450.

" officer shall be informed of such apprenticeship: and in either " of the cases hereinbefore mentioned, the master of such ap- " prentice shall not be entitled to receive any wages, pay, or al- " lowances, by virtue of any such indenture."

But though the master is clearly entitled to the earnings of his *apprentice*, it may be doubted whether the same rule applies to the case of *hired servants*. All the cases which occur in the books relate to apprentices only. It is, however, observed, (*r*) with regard to *hired servants*, that the master's proper remedy in all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action either against the employer for loss of service, if he knew of the first retainer, or against the servant himself for breach of his contract, such a case rather importing the master's right to damages for the injury sustained by the consequences of the second retainer, than a right to the profits accruing from the employment.

3. *Of the Servant's liability for Breach of his implied Undertaking to serve his Master with Diligence and Fidelity, &c.*

Upon every contract of hiring there is an undertaking implied on the part of the servant, that he will serve his master with care, diligence, and fidelity: so that wherever the master sustains an injury by reason of any negligence or misconduct on the part of his servant, the former may maintain an action against the latter, either of *assumpsit*, or on the *case* in *tort* to recover a compensation by way of damages for breach of his duty.

Thus, (*s*) if A. is employed by B. to sail from *England* to the *Indies*, and A. covenants, that he or his servants will not thence import any callicoes, &c., and A. retains C. as his servant in this voyage, and acquaints him with the covenants, and notwithstanding C. falsely and fraudulently brings thence certain callicoes, &c. A. shall have an action against C., for though no action lies by a master for the bare breach of his command, yet if a servant does any thing falsely and fraudulently, to the damage of his master, an action will lie.

(*r*) *Co. Lit.* 117. *a.* n 1. *Bac. Abr. tit.* Master and Servant.
(*s*) 1 *Sid* 298. 1 *Lev.* 168.

So,

So, if a merchant's ſervant takes his maſter's goods that are arrived at a port in *England*, and, before payment of the cuſtoms, lands them, *per quod* the goods are forfeited and ſeized by the king; the maſter may have an action of treſpaſs upon the caſe againſt his ſervant. (*t*)

So, if a ſervant drives his maſter's cart, and by his negligence ſuffers the cattle to periſh, an action upon the caſe lies againſt him. (*u*)

If a man deliver a horſe to his ſervant to go to market, or a bag of money to carry to *London*, which he neglects to do, the maſter may have an action of *account* or *detinue* againſt him: or, he might now maintain an action of *aſſumpſit* for breach of his implied promiſe. (*v*)

But if a man delivers money to his ſervant to carry to ſuch a place, and he is robbed, the ſervant ſhall not anſwer for it; for a ſervant only undertakes for his diligence and fidelity, and not for the ſtrength and ſecurity of his defence, and therefore ſhall not be obliged to preſerve his maſter's property at all adventures. (*w*)

4. *Of the Contract between Maſter and Servant for Wages; and of the Servant's Right to a Month's Warning, &c.*

If a perſon retains a ſervant, and agrees to pay him ſo much by the day, month, or year, the ſervant may have an action againſt the maſter on the contract, or againſt his executors; for every ſuch retainer will be preſumed to be in conſideration of wages, unleſs the contrary appears. (*x*)

So, if a man be retained in *London* to ſerve beyond ſea, he may have an action for his wages in *England*; and lay the venue in any county. (*y*)

Where a perſon is hired as an aſſiſtant, or deputy, to perform the duties of a particular office, at a certain yearly ſalary, and the principal is afterwards appointed to another ſituation, and he employs the ſame perſon to tranſact the buſineſs of both offices, the

(*t*) *Cro. Jac.* 265. *Lane* 65.
(*u*) 7 *H.* 4. 14. *Bro. tit. Action ſur. caſe* 34.
(*v*) Vide 21 *H.* 4. 14. *Moor* 248.
(*w*) *Bac. Abr. tit.* Maſter and Servant, *M.*
(*x*) *Ibid. H.* (*y*) *Brownl.* 54.

aſſiſtant is not entitled to any increaſe of ſalary without ſome agreement or promiſe of the principal.

Thus, in the caſe of *Bell* v. *Drummond*, executor, &c. (z) which was an action of *aſſumpſit* for work and labour done and performed by the plaintiff for *Paterſon*, the defendant's teſtator; it appeared that the teſtator was clerk to the commiſſioners of the land tax, and that the plaintiff had done the buſineſs of his office at a ſalary of 100*l.* a year; that afterwards, on new duties being impoſed, the teſtator was appointed clerk to the commiſſioners of thoſe duties, and the plaintiff alſo tranſacted that buſineſs, but no agreement had been made as to any increaſe of ſalary, though the labour of the office was conſiderably increaſed. It was proved, that the plaintiff having demanded an additional ſtipend, the teſtator had deſired the witneſs (as a friend to both parties) to conſider what ought to be allowed the plaintiff. That accordingly the witneſs did proceed to make an eſtimate; but before he had finally made up his mind the teſtator died.

Lord *Kenyon*, Ch. J. ſaid, "that had the plaintiff's caſe reſted wholly on the fact of the new duty being impoſed upon him, he ſhould not think it ſuch a caſe as would have entitled him to come into a court of juſtice for an additional ſtipend on a *quantum meruit*; if it was, every porter in a ſhop, or clerk in an office, would, upon an increaſe of his maſter's buſineſs, be equally entitled to demand an increaſe of wages. But upon the evidence produced it appeared clearly that the teſtator himſelf thought that he ought to pay ſomething, and the only matter in controverſy between him and the plaintiff was the *quantum* of the additional allowance." The plaintiff obtained a verdict.

If a ſlave comes over from the *Weſt Indies*, and continues in the ſervice of his maſter in *England*, he is not entitled to wages, unleſs there has been ſome agreement or contract of ſervice for wages.

Thus, in the caſe of *Aſfred* v. *Marquis* of *Fitzjames*, (a) which was an action of *aſſumpſit* for ſervant's wages. It appeared in evidence, that the plaintiff came over from *Martinique* with the Dutcheſs of *Fitzjames*. His father and mother had been ſlaves on an eſtate belonging to her in that iſland. He had entered into her

(z) *Peake's Cas. N. P.* 45. (a) 3 *Eſp. Rep.* 3.

ſervice

ſervice in *Martinique* before her marriage with the *Marquis*, and continued to ſerve her after her marriage; and the Marquis found him with neceſſaries of every deſcription. There was no contract for any hiring for wages; but a witneſs ſaid, that the *Marquis* had been heard to promiſe to pay him wages.

Lord *Kenyon*, Ch. J. ſaid, "it was his decided opinion that up to the time of the promiſe to pay wages, which the witneſs had ſaid the defendant had made, the plaintiff had no title to recover, as there was no original contract of ſervice for wages."

A contract to pay a certain ſum *per annum*, in conſideration of ſervices to be performed, is an entire contract for a year, and without a full year's ſervice, the ſervant is not entitled to any part of his ſalary.

Thus, in the caſe of The *Counteſs of Plymouth*, v. *Throgmorton*, (*b*) which was an action of debt, wherein the plaintiff declared upon a writing, whereby the defendant's teſtator had appointed the plaintiff's teſtator to receive his rents, and promiſed to pay him 100*l.* *per annum* for his ſervice, and ſhows that the defendant's teſtator died three-quarters of a year after, during which time he ſerved him, and demands 75*l.* for the three-quarters; judgment for the plaintiff in C. B. by *nil dicit*. But upon error brought in K. B. the judgment was reverſed; it being held, that without a full year's ſervice nothing could be due, and that it was in nature of a condition precedent.

But with regard to the common caſe of an hired ſervant, it is ſaid, (*c*) that ſuch a ſervant, though hired in a general way, is conſidered to be hired with reference to the general underſtanding upon the ſubject, that the ſervant ſhall be entitled to his wages for the time he ſerves, though he do not continue in the ſervice during the whole year.

So, if a maſter turns away his ſervant without a previous notice or warning, (except for miſconduct) the ſervant is entitled to a month's wages.

(*b*) 1 *Salk.* 65. 3 *Mod.* 153. *S. C.* *See alſo* 6 *Term Rep.* 320. *S. P.* 3 *Vin. Abr. tit.* Apportionment, *fo.* 8.
(*c*) *Per* Lawrence, *Juſt.* 6. *Term Rep.* 316.

Thus, in the caſe of *Robinſon* v. *Hendman*, (*d*) which was an action of aſſumpſit brought by the plaintiff to recover the amount of a month's wages, on the ground of his having been diſcharged by the defendant, without any notice or warning. No agreement was proved to the effect of the claim; but general uſage only was relied on. The defendant proved that the plaintiff was negligent in his conduct, frequently abſent when his maſter wanted him, and often ſlept out.

Lord *Kenyon*, Ch. J. ſaid, "that though in the preſent caſe he thought the plaintiff was not entitled to recover, on account of his miſconduct, he was of opinion, that if a maſter turned away his ſervant without warning, or previous notice, and there was no fault or miſconduct in the ſervant to warrant it, he ought to have the allowance claimed, of a month's wages; which he thought reaſonable."

5. *Of the Maſter's liability to provide Medicine, &c. for his Servant in Caſe of Illneſs.*

Different opinions have been held upon this ſubject; and but three caſes appear in print. In two of them it was determined that a maſter is not bound to provide medical attendance, &c. for his ſervant, who meets with an accident in his maſter's ſervice. In the other, which was tried before Lord *Kenyon*, Ch. J. it was ruled, that a maſter was liable for medicines furniſhed to his ſervant whilſt in his ſervice. The two former caſes, it ſhould be obſerved, were argued and determined in the courts of *Weſtminſter-Hall*; the latter was only a determination at *niſi prius*. I ſhall, however, preſent them to the reader in the order in which they were determined.

The firſt is *Newby* v. *Wiltſhire*, (*e*) which was *aſſumpſit* for money paid, laid out, and expended for the defendant's uſe. The caſe for the opinion of the court ſtated, that the defendant, a farmer, ſent his waggon, in *May* 1784, to *Cambridge*; and in returning, a boy that had been ſent with it fell from the ſhafts and broke his leg: that the boy could not be removed out of the pariſh where the accident happened, on account of the danger it might occaſion:

(*d*) 3 *Eſp. Rep.* 235.
(*e*) *Eaſt Term* [illegible] 25 *G.* 3. *K. B.* 2 *Eſp. Rep.* 739.

that

that the plaintiff was overſeer of the pariſh where the accident happened, and took the charge of getting the boy cured upon himſelf: that it was neceſſary to cut off the leg; and the overſeer expended, in and about the cure, 32*l.*: that afterwards the boy ſerved the remainder of the year with his maſter; and the action was brought to recover from the defendant the expences of the boy's cure.

Lord *Mansfield*, Ch. J. ſaid, "I don't applaud the humanity of the maſter in this caſe; he does not enquire after his ſervant for ſix weeks after the accident; and when he does, "he paſſes by on the other ſide." I think in general, a maſter ought to maintain his ſervants, and take care of them in ſickneſs; but the queſtion now is, what is the law? There is, in point of law, no action againſt the maſter to compel him to repay the pariſh for the cure of his ſervant: no authority whatſoever has been cited; and it ſeems to me that it cannot be. The pariſh is bound to take care of accidents; they do their duty in that reſpect: therefore I am inclined to think that the plaintiff cannot recover." The other Judges concurred in this opinion, and the Court gave judgment for the defendant.

The ſecond reported caſe on this ſubject, is, *Scarman* v. *Caſtell*, (*f*) which was an action to recover the amount of an apothecary's bill for medicines furniſhed to, and attendance on a ſervant of the defendant, while living under his roof. The plaintiff an apothecary, attended the ſervant in the houſe of the defendant, who was a man of large fortune, but it was not proved that the plaintiff was expreſsly employed by the defendant; and therefore it was contended that the plaintiff could not recover againſt the maſter. But Lord *Kenyon*, Ch. J. ſaid, "that he was of opinion that a maſter was obliged to provide for his ſervant in ſickneſs and in health, and that he, therefore, was liable for medicines furniſhed to his ſervant, while in his ſervice. Not that his ſervant was at liberty to go abroad and contract debts for medicines, but that while he was under his maſter's roof, the maſter was under a legal, as well as a moral obligation, to provide the neceſſary medicines, and to pay for ſuch as were adminiſtered to his ſervant under ſuch circumſtances." The counſel for the defendant then cited the caſe of

(*f*) *Sittings at Weſtm. after Hil. Term* 35 *G.* 3. *K. B.* Coram *Ld.* Kenyon, *Ch. J.* 1 *Eſp. Rep.* 270. *and cited in* 3 *Bos. and Pul.* 248.

Newby v. *Wiltshire* ; but it was answered by the plaintiff's counsel that the case cited was of a servant in husbandry. Lord *Kenyon* said, that that case was distinguishable from the present. He therefore directed the jury to find a verdict for the plaintiff, which they did to the full amount of the plaintiff's bill.

But, in the case of *Wennall* v. *Adney*, (*g*) which was also an action of *assumpsit* to recover the amount of a surgeon's bill. The cause was tried before *Le Blanc*, J. at *Shrewsbury* assizes, when it appeared that the action was brought to recover 8*l.* 18*s.* 6*d.*, the amount of a bill for medical attendance upon a servant of the defendant, who had his arm broken while driving the defendant's team, and who had been hired by the defendant, at the yearly wages of 3*l.* 10*s.* and victuals ; that the accident happened nearer the house of the servant's mother, than that of the defendant, and that he was taken to his mother's house ; that the accident happened in one parish, that the house of the servant's mother was situated in another, and the defendant's in a third ; that the plaintiff, who was the surgeon usually employed by the defendant, accidentally passing near the mother's house, was called in, and desired to attend her son ; at which time nothing was said about the defendant paying for his attendance, but the mother observed that she had always been able to pay her way, and hoped she should do so still ; that during the time of the servant's confinement he was supplied with victuals from the defendant's house ; that the plaintiff first delivered his bill to the defendant, but afterwards called a meeting of the parishioners of the parish in which the mother's house was situated, and submitted it to them for payment, who refused to discharge it. The learned Judge being of opinion that the defendant, not having employed the plaintiff, or made any promise of payment, was not liable, nonsuited the plaintiff. The case afterwards came before the Court of Common Pleas upon a motion to set aside the nonsuit ; and, after argument, the Judges delivered their opinions *seriatim*.

Lord *Alvanley*, Ch. J. "I have reason to believe that the opinion delivered by Lord *Kenyon*, in the case of *Scarman* v. *Castell*, was not a hasty opinion, but formed upon reflection. I have no difficulty, however, in saying, that I concur with the learned judge before whom this cause was tried, in thinking that the defendant is not liable. The sum in dispute is only 8*l.* 18*s.* 6*d.*, and if a wish

(*g*) *Mich. Term* 43. *G.* 3 *C. B.* 3 *Bos. and Pul.* 247.

is

is entertained by those whom this judgment may affect, to obtain a more solemn decision upon this point, some opportunity should be taken where a greater stake is in litigation. In this kind of question much may depend upon the nature of the contract entered into between the master and the servant. Sometimes a master engages to supply his servant with necessary victuals, and it may be undoubtedly argued, that necessary victuals mean such victuals as may suit the state of health or infirmity in which the servant happens to be; as if a servant be in need of wine, or victuals of that description, which are given by way of medicine. It is sufficient, however, to observe, that previous to the case of *Scarman* v. *Castell*, there is no authority in the law of *England* to be found which warrants the position contended for on the part of the plaintiff. I have no doubt whatever that parish officers are bound to assist where such accidents as these take place; and that the law will so far raise an implied contract against them as to enable any person who affords that immediate assistance, which the necessity of the case usually requires, to recover against them the amount of money expended."

Heath, J. "I believe that the humanity of Lord *Kenyon* misled him when he adopted the doctrine upon which he decided the case of *Scarman* v. *Castell*. Probably at the moment it occurred to him that if the master was not bound to provide medical assistance for his servant, the latter would be left wholly destitute; but I am perfectly sure it is more for the advantage of servants that the legal claim for such assistance should be against the parish officers rather than against their masters; for the situation of many masters who are obliged to keep servants is not such as to enable them to afford sufficient assistance in cases of serious illness."

The other judges delivered their opinions to the same effect; and the rule for setting aside the nonsuit was discharged.

So where a pauper had her legal settlement in the parish of A. was conveyed to the next house in an adjoining parish of B. and died there, visited by the overseers of A. united in the surgeon who attended the pauper, but without the knowledge of the overseers: held the surgeon could have no claim against the overseers for the expenses of the cure; in this case not even an implied assumpsit to pay them could be raised. CHAPTER

CHAPTER IV.

Of Principal, Factor, and Agent.

A FACTOR, in commerce, is an agent or broker employed by merchants to buy or ſell goods, or negotiate bills, or tranſact any kind of buſineſs on their account; and for which he is entitled to a certain commiſſion or allowance. (*a*)

The general duty of a factor or agent is to procure the beſt intelligence of the ſtate of trade at his place of reſidence; of the courſe of exchange; of the quantity and quality of goods at market, their preſent price, and the probability that it may riſe or fall; to pay exact obedience to the orders of his employers; to conſult their advantage in matters referred to his direction; to execute their buſineſs with all the diſpatch that circumſtances will admit; to be early in his intelligence, diſtinct in his accounts, and punctual in his correſpondence. (*b*)

(*a*) *Vide* Mal. lex mer. 81. Beawes lex mer. 45. (*b*) *Ibid.*

In

It is intended to conſider the ſubject of this chapter in the following order:

1. *Of the general and limited Power of a Factor or Agent; and of Contracts, &c. made by him on Account of his Principal.*

2. *Of Payment to, or Settlement with a Factor or Agent.*

3. *In what Caſes a Factor or Agent may ſue or be ſued upon Contracts made by him on account of his Principal.*

4. *Of Sales, &c. on* Del credere *Commiſſion.*

5. *Of Sales, &c. by Auctioneers.*

6. *Of Contracts and Agreements by Principal, Factor, and Agent* Inter ſe; *and of their reſpective Rights and Remedies:* And,

    1. *Of a Factor or Agent's liability on a Promiſe to indemnify his Principal upon a Re-ſale of Goods, &c.*

    2. *Of the Remedy againſt a Factor or Agent for not accounting, and for Negligence, &c.*

    3. *Of the Factor or Agent's Right of Lien on the Goods, &c. of his Principal.*

    4. *In what Caſes a Factor or Agent is not entitled to recover for Commiſſion, or Money paid, &c.*

1. *Of the general and limited Power of a Factor or Agent; and of Contracts, &c. made by him on Account of his Principal.*

A factor or agent's power is either general or limited. If he be entrusted with a general power, he must exercise a sound and honest judgment in those matters which are left to his discretion: for he will not be justified in taking unreasonable or unusual measures, or doing any thing contrary to the interest of his principal. If, however, his proceedings are challenged, the principal must prove, that he might have done better, and was guilty of wilful mismanagement.

When a factor or agent's power is limited, he must strictly adhere to his orders, which should always be given in writing. If he exceeds his power, though with a view to his employer's interest, he will be liable for the consequences. For example, if he gives credit, when none ought to be given, or longer credit than directed, for the sake of a better price; and the buyer becomes insolvent, he shall be answerable for the debt. (*c*)

A factor or agent acting under a general power may sell on credit; particularly if the goods consigned be generally sold on credit at the place of consignation; unless, indeed, he be expressly restricted by the terms of his commission not to give credit. (*d*) He should, however, be careful to enquire into the solvency and circumstances of the person to be trusted.

Although opinion will never justify the factor for acting contrary to orders, necessity sometimes will. As, if he be limited to sell goods at a fixed price; and the goods be perishable, and not in a condition to be kept, and the factor has no time or opportunity for consulting with the principal, it is apprehended he may sell them for ready money under the price limited, in order to prevent a total loss. (*e*) But in such case it would be advisable to call in

(*c*) *Vide* Mal. lex mer. 81. *and* Sadock *v.* Burton. *Velv.* 202.

(*d*) 2 *Ch. Cas.* 57. Mal lex mer 83 *Will's Rep.* 406 3 *Bos. and Pul.* 489. *But see* 1 *Bulst.* 104. *Cas. K. B.* 5 4. 2 *Mod.* 100. 12 *Mod.* 511, 515. contra.

(*e*) *But see* 2 *Mod.* 100.

two

two ſworn brokers, or other competent perſons to examine the commodity.

A factor or agent cannot delegate his power to another without an expreſs authority from his principal for that purpoſe. (*f*) And in the execution of the power given to a factor or agent, all contracts, and other acts ſhould be expreſſed to be made and done by him in the name and on the account of his principal; otherwiſe the principal may not in all caſes be bound by them, and in that event the factor or agent would be *perſonally* liable. (*g*)

A factor or agent who has power to ſell the goods of his principal cannot bind or affect the property of them by *tortiouſly* pledging, or otherwiſe diſpoſing of them, either by way of ſecurity for, or in ſatisfaction of his own debt. (*h*)

And where goods are thus pledged, or diſpoſed of, the principal may recover them back by action of trover againſt the pawnee, without tendering to the factor or agent what may be due to him, or without any tender to the pawnee of the ſum for which the goods are pledged. And it is no excuſe that the latter was wholly ignorant that the former held the goods as a mere factor or agent. (*i*)

But a factor who has a lien on the goods of his principal may deliver them over to a third perſon, as a ſecurity to the extent of his lien, with notice of his lien, and may appoint ſuch third perſon as his ſervant to keep poſſeſſion of the goods for him. And in that caſe the principal muſt tender the amount of the lien due to the factor before he can be entitled to recover back the goods ſo pledged. (*k*)

If goods are conſigned to a factor or agent who afterwards becomes bankrupt; and the goods remain in ſpecie in his hands at

(*f*) *Bunb.* 166.

(*g*) Vide 9 *Co.* 76. *b. Rol. Abr.* 330. *F. l.* 1. *Cas. Temp. Hardw.* 1. 2 *Stra.* 705. 955. 1. *Term Rep.* 181. 6 *Term Rep.* 176, 7. *Com. Dig tit.* Attorney. C. 14.

(*h*) *Vide the caſes of* Paterſon *v.* Taſh, *Stra.* 1178. Maans *v.* Henderſon, 1 *Eaſt Rep.* 337. Newſom *and another v.* Thornton, 6 *Eaſt Rep.* 17. M'Combie *v.* Davies, *Ib.* 538.

(*i*) M'Combie *v.* Davies, 7 *Eaſt Rep.* 5. *See alſo* Hartop *v.* Hoare, *Stra.* 1187. Daubigny *v.* Duval, 5 *Term Rep* 604.

(*k*) *Vide* M'Combie *v.* Davies, 7 *Eaſt Rep.* 7. Per *Lord* Ellenborough, *Ch. J.*

the time of such bankruptcy, the principal may recover them from the assignees by action of *trover:* or, if the factor sells the goods, and his assignees afterwards receive the money, the principal may recover it from them in an action of *assumpsit* for money had and received. (*l*) So, where the factor on such a sale takes notes in payment from the vendee, payable at a future day, and his assignees afterwards receive the money, the principal may recover it from them in the same form of action. (*m*)

So, bills remitted to a factor, or banker, while unpaid, are in the nature of goods unsold; and if the factor become bankrupt they must be returned to the principal, subject to such lien as the factor may have thereon. (*n*)

But if goods be consigned to a factor for sale, and he sell, and receive the money for them before his bankruptcy, and do not purchase with the money any specific thing capable of being distinguished from the rest of his property, the principal connot recover the whole amount from the assignees, but must come in under the commission. (*o*)

It hath also been ruled in equity, (*p*) that if one employs a factor, and intrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears by evidence that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factors; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, &c. for as money has no ear-mark, equity cannot follow that in behalf of him who employed the factor.

But if A. employs B. as his factor, to sell cloth and B. sells the cloth on credit and before the money is paid, B. dies indebted by speciality more than his assets will pay; this money shall be paid to A. and not to the administrator of B. as part of his assets, but thereout must be deducted what was due to B. for commission; for a factor is in nature only of a trustee for his principal. (*q*)

(*l*) Scott *v.* Surman, *Willes Rep.* 400. *See also* 6 *East Rep.* 26. *in notis.*

(*m*) *Willes Rep.* 400.

(*n*) Zinck *v.* Walker, 2 *Bl. Rep.* 1154. *See also Co. Bkpt. Laws, Chap.* 8, *f.* 15.

(*o*) Scott *v.* Surman, *Willes Rep.* 400.

(*p*) Whitcomb *v.* Jacob, 1 *Salk.* 160.

(*q*) Burdett *v.* Willett, 2 *Vern.* 638.

I now

I now proceed to ſhow what contracts and other acts of a factor or agent will bind his principal.

In the caſe of *Bolton* v. *Hillerſden* (*r*) which was an action of *aſſumpſit* upon a promiſſory note. The defendant being a merchant, his apprentice delivered a note to the plaintiff, obliging his maſter to pay 100*l.* to the plaintiff, or his order. Upon the trial it was proved, that the apprentice had once given ſuch a note to another perſon for money received of him by the apprentice, which money was applied to the maſter's uſe, and that the money due on that note had been recovered of the maſter. The defendant proved that he did not truſt his apprentice to give ſuch notes; and the apprentice himſelf ſwore, that he had loſt 10*l.* of his maſter's money at play, and that the day following a foreign bill was drawn upon his maſter, which he could not pay; therefore he reſorted to the plaintiff, with whom the defendant uſually had dealings: and becauſe the perſon who brought the foreign bill would not receive guineas, being the only money he had, he perſuaded the plaintiff to receive the *guineas*, and pay the bill, which the plaintiff did: and that the apprentice gave this note to the plaintiff for money received of him to pay the 100*l.* which he had loſt at gaming.

Holt, Ch. J. ſaid, "If a maſter has never entruſted a ſervant to charge him by ſigning of notes in the maſter's name; yet if the money for which ſuch note is ſigned comes to the uſe of the maſter; or if in this preſent caſe the ſervant gave the note to raiſe money to pay the foreign bill charged to his maſter, which is for the benefit of his maſter; ſuch note will bind the maſter, though he never permitted the ſervant to ſign ſuch notes before. But if in this caſe the note was given for the money which the apprentice had loſt at gaming, and which did not come to the maſter's uſe, the maſter ought not to be bound by it." The jury gave a verdict for the plaintiff, which *Holt* well approved.

So, where a ſervant having power to draw bills of exchange in his maſter's name, is afterwards turned out of the ſervice. *Holt*, Ch. J. held, (*s*) that if he draws a bill in ſo little time after that the world cannot take notice of his being out of ſervice; or if he were a long time out of his maſter's ſervice, but that kept ſo ſecret, that

(*r*) 1 *Ld. Raym.* 224 3 *Salk.* 234. *S. C.*
(*s*) Holt. *Rep.* 460. *See alſo Bac. Abr. tit.* Maſter and Servant, *K.*

the

the world cannot take notice of it, the bill in thoſe caſes ſhall bind the maſter.

But with reſpect to the extent of an agent's power there is a wide diſtinction between *general* and *particular* agents. If a perſon be appointed a general agent, as in the caſe of a factor for a merchant reſiding abroad, the principal is bound by his acts. But an agent, conſtituted ſo for a particular purpoſe and under a limited and circumſcribed power, cannot bind the principal by any act in which he exceeds his authority.

Thus, in the caſe of *Fenn* and another v. *Harriſon* and others, (*t*) where it appeared, that a bill of exchange was drawn by *Liveſay* and Co. on *Gibſon* and *Johnſon* in favour of one *Norman*, which came by indorſement to the defendants; who, being deſirous of getting it diſcounted, employed *Francis Huet* for that purpoſe, telling him to carry it to market and get caſh for it, but that they would not indorſe it. *F. Huet* applied to his brother *James Huet* to get the bill diſcounted, informing him that it was the defendants' bill, and that though they did not chuſe to indorſe it, yet he added (as a reaſon of his own) that, as their number was on the bill, it was equivalent to an indorſement; and that he (*F. Huet*) would indemnify him if he indorſed the bill. On an application by *James Huet* to the plaintiffs, and on his indorſing the bill, without which indorſement he could not have got the bill diſcounted, the plaintiffs diſcounted it; chiefly relying on the credit of *Gibſon* and *Johnſon*, for at that time they did not know that the defendants had had any concern with the bill. Afterwards, however, on the failure of *Gibſon* and *Johnſon*, the plaintiffs having heard that the bill had paſſed through the defendants' hands, applied to them for payment, who at firſt refuſed, but afterwards promiſed to take it up; and, on their not doing ſo, this action was brought to recover the amount of it. On theſe facts the court held, that *F. Huet* was a *ſpecial agent* under a limited authority, and as he was expreſsly directed by the defendants not to indorſe the bill, but merely to carry it to market and get caſh for it, he could not bind his principals (the defendants) by any act beyond the ſcope of ſuch limited authority. And that the defendants were neither liable on account of the indorſement made by *James*

(*t*) 3 *Term Rep.* 757.

Huet,

Huet, nor on their ſubſequent promiſe to pay, becauſe not being under any obligation, it was *nudum pactum*.

But, the court granted a new trial; and upon the ſecond trial it appeared in evidence, that the defendants, when they deſired *F. Huet* to get the bill diſcounted, *did not ſay that they would not indorſe it*. The court, (*v*) on theſe facts being ſtated, were unanimouſly of opinion, that the plaintiffs ought to recover the amount of the bill, on the ground that as the defendants had authorized *F. Huet* to get the bill diſcounted, without reſtraining his authority as to the mode of doing it, they were bound by his acts; and that, if it were doubtful from the converſation, their ſubſequent conduct in promiſing to pay the bill, was deciſive. But *Aſhhurſt*, *Buller*, and *Groſe*, Juſtices, ſaid, that unleſs the evidence on this trial had varied from that given before, they ſhould have continued to entertain the ſame opinion which they delivered on the former occaſion.

So, in the caſe of the *Eaſt India Company* v. *Henſley*, (*u*) which was an action on the caſe to recover damages for the loſs ariſing from the re-ſale of a certain quantity of raw ſilk ſold by the company at one of their ſales to the defendant. The ſilk had been bought by one *Briggs*, a broker, for the defendant, and the defence ſet up by the defendant was, that his orders to *Briggs* were to buy the beſt *Bengal* raw ſilk, whereas this was not raw ſilk, nor of the beſt quality.

Lord *Kenyon*, took the diſtinction between a *general* and *ſpecial* agent; "that in the firſt caſe the principal muſt be bound by all his acts, whereas in the latter, he is only bound, while the agent acts within the ſcope of his authority, and that if in the preſent caſe the defendant could prove that he had ſo ſpecially authorized *Briggs* to bid for him for beſt *Bengal* ſilk, and this turned out to be not of that deſcription, that he ſhould not be bound by his contract ſo made without his authority; but that *Briggs* ſhould be liable to an action at the ſuit of the Company for his abuſe of it."

But though a *ſpecial* agent, acting under a limited authority, cannot bind his principal if he exceed his authority; yet if, upon

(*v*) 4 *Term Rep.* 177. (*u*) 1 *Eſp. Rep.* 111.

the purchaſe of goods, an agent has any diſcretion given him to exceed the ſum ordered to be paid, the principal is bound by the contract of his agent, even if it ſhould exceed that ſum; for by giving him a power to exerciſe his diſcretion he cannot be conſidered as a ſpecial agent. (*w*)

Where an agent is employed to buy goods, his acknowledgment of having received them, is evidence againſt his principal of a delivery to him. (*x*)

An agent of a regiment is but a ſervant of the colonel, and the receipt of the agent charges the colonel. There is no privity between the king, or the ſoldier, and the agent. (*y*)

A principal is, in general, reſponſible for the miſrepreſentation and deceit of his factor or agent. As, in the caſe of *Hern* v. *Nichols*, (*z*) which was an action on the caſe for a deceit, the plaintiff ſet forth, that he bought ſeveral parcels of ſilk for ——— ſilk, whereas it was another kind of ſilk; and that the defendant, well knowing this deceit, ſold it to him for ——— ſilk. On the trial, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond ſea: And the doubt was, if this deceit could charge the merchant? *Holt*, C. J. was of opinion, that the merchant was anſwerable for the deceit of his factor, though not *criminaliter* yet *civiliter*; for ſeeing ſomebody muſt be a loſer by this deceit, it is more reaſonable that he who employs and puts a truſt and confidence in the deceiver ſhould be a loſer than a ſtranger: And upon this opinion the plaintiff had a verdict.

But it is ſaid, * "If a ſervant ſelleth a horſe with warranty, it is the ſale and contract of the maſter, but it is the warranty of the ſervant, unleſs the maſter giveth him authority to warrant it, for a warranty is void which is not made and annexed to the contract; but there it is the warranty of the ſervant, and the contract of the maſter: but if the maſter do agree unto it after, it ſhall be ſaid that he did agree to it *ab initio*." Mr. Juſtice *Aſhhurſt*, (*a*) how-

(*w*) Hicks v. Hankin, 4 *Eſp. Rep.* 114. (*x*) Per Buller, *Juſt.* 3 *Term Rep.* 454. (*y*) Per Holt, *Ch. J.* 1 *Ld. Raym* 101.
(*z*) 1 *Salk.* 289. *Holt.* 462. *S. C. See alſo* 1 *Term Rep.* 12. *Park. on Inſurance, Chap.* 10. * *Per* Doddridge, *Juſt. Godb.* 361.
(*a*) 3 *Term Rep.* 760. *See alſo the caſe of* Helyear v. Hawke, 5 *Eſp. Rep.* 72.

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ever, in commenting upon the above *dictum* makes this diſtinction, namely, that if a perſon keeping livery ſtables, and having a horſe to ſell, directs his ſervant not to warrant him, and the ſervant does nevertheleſs warrant him, ſtill the maſter would be liable on the warranty, becauſe the ſervant was acting within the general ſcope of his authority, and the public cannot be ſuppoſed to be cognizant of any private converſation between the maſter and ſervant: but if the owner of the horſe were to ſend a ſtranger to a fair with expreſs directions not to warrant the horſe, and the latter acted contrary to the orders, the purchaſer could only have recourſe to the perſon who actually ſold the horſe; and the owner would not be liable on the *warranty*, becauſe the ſervant was not acting within the ſcope of his employment.

2. *Of Payment to, or Settlement with a Factor or Agent.*

A purchaſer of goods from a factor or agent has a right to pay him the money for them; and his receipt will be a ſufficient diſcharge. (*b*) But if the principal forbids the vendee of goods to pay the value to the factor, the vendee would not be juſtified in afterwards paying the money to the factor. For a factor's ſale, by the general rule of law, creates a contract between the owner and the buyer, which entitles the former to call upon the latter for payment at any time before the money is paid over to the factor: and it is the ſame notwithſtanding the factor acts upon a *del credere* commiſſion. (*c*)

But if the factor at the time of the ſale agree to ſet off a debt of his own due to the vendee, it is binding upon the principal, and conſidered the ſame as if the factor received ſo much money from the vendee. (*d*)

So, where a factor, who ſells goods under a *del credere* commiſſion, ſell them as his own, and the buyer knows nothing of the principal, the buyer may ſet off any demand he may have on the factor againſt the demand of the principal. (*e*)

(*b*) *Comp.* 256. (*c*) 2 *Stra.* 1182. *Comp.* 255. *Co. Bkpt. laws. Chap.* 8 *ſ.* 15. *But ſee Bul N. P.* 130. (*d*) *Willes Rep.* 400
(*e*) George *v.* Clagett, 7 *Term Rep.* 359. *See alſo* Rabone *v.* Williams, *Ib.* 360. in notis, *S. P.*

Payment of a debt to an agent, (who is an attorney reſiding in the country, and employed by the plaintiff's attorney, living in *London*, to ſue a debtor, reſident in the country) is not a valid payment to the plaintiff; but if made to his own attorney it would be a good payment. (*f*)

If a maſter ſends his ſervant to receive money owing to him, and the ſervant inſtead of taking money, receives a bill, and the maſter, on being told of it, diſagrees, he is not bound by this payment; but acquieſcence, or any thing tantamount will be proof of the maſter's conſent; and will make the act of the ſervant the act of the maſter.

Thus, in the caſe of *Ward* v. *Evans*, (*g*) which was an action for money had and received, &c. The facts found by the jury were, that one *Fellows*, a merchant, who kept his caſh with the defendant, a goldſmith in *Lombard-Street*, was indebted to the plaintiff in 60*l.* 10*s.* the plaintiff ſent his ſervant to receive the money of *Fellows*, who ordered his ſervant to pay the plaintiff's man the money at the defendant's. Accordingly both the ſervants went to the defendant's ſhop, and there the defendant's ſervant was directed to pay the 60*l.* 10*s.* which he accordingly did by giving the plaintiff 10*s.* in caſh, and a note ſubſcribed by one *Wallis*, a goldſmith, for 60*l.* payable to one *Freeman*, or bearer, which the plaintiff's ſervant accepted. This tranſaction was about noon, and at that time *Wallis* was a ſolvent perſon, and continued paying his bills till night. Next morning the plaintiff's ſervant coming with the note to receive the 60*l.* of *Wallis*, found that he had ſtopped payment and was become inſolvent. It did not appear that the plaintiff was conuſant of, or privy to this tranſaction of his ſervant, or had given him any authority to receive a note inſtead of money, or approved of it afterwards.

The Court held, "That when a ſervant is ſent to receive money on a bill, he cannot accept a note inſtead of money without the particular directions of his maſter; and therefore the delivery and acceptance of *Wallis*'s note was no payment: But if the maſter afterwards aſſents to this mode of payment, it amounts to a pre-

(*f*) Yates v. Freckleton, *Doug.* 623. (*g*) 2 *Ld Raym.* 928. *Com. Rep.* 138. 6 *Mod.* 36. *S. P.* Thorold v. Smith, *Holt Rep.* 464. *S. P.*

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vious command. The taking, therefore, of such a note is no payment; for it is always a conditional acceptance, and so understood not to be a discharge till paid. But still the money ought to be demanded in convenient time, for if the party keep the note by him without demanding it, he must run the hazard of it; but here it was demanded in due time." Judgment for the plaintiff.

In the case of *Nickson* v. *Brohan*, (*h*) it appeared that the plaintiff sent his servant, who was accustomed to transact his business for him, on *Saturday* morning, with a note drawn upon Sir *Stephen Evans*, with orders to get from him either bank bills or money, and turn them into Exchequer notes; but the servant having other business of his master upon his hands, to save himself the time and trouble of going to Sir *Stephen*, went to the defendant and prevailed on him to give him a bank bill for the note upon Sir *Stephen*; and then in pursuance of his master's orders, invested it in Exchequer notes, which he brought to his master, not letting him know but that he had gone to Sir *Stephen*. On the *Monday* following Sir *Stephen Evans* failed; and the question was, upon whom this loss should fall.

Parker, Ch. J. who tried the cause, was first of opinion that the loss should fall upon the defendant, because the servant acted contrary to his master's orders, and the defendant by furnishing the servant with a bank bill, did the master no service at all; and if he had not done it, the servant must in obedience to his master's orders have gone himself and received the money from Sir *Stephen*. But the Court, after argument, were all of opinion, "That the loss ought to fall upon the master alone; for a servant by transacting the affairs of his master does thereby derive a general authority and credit from him; and if this general authority should be liable to be determined for a time, by any particular instructions or orders, to which none but the master and servant are privy, there would be an end of all dealing but with the master."

So, if a son having a general authority to receive and pay money for his father, receive money due on a bill to his father, and give a receipt for it, as money had to his father's use, and afterwards gives it away, the father can only recover it back from the donee; for his son's receipt is a good discharge of the debt, and therefore

(*h*) 10 *Mod.* 109.

his poſſeſſion is the poſſeſſion of the father; the ſon being for this purpoſe his ſervant. (*i*)

So, if A. uſually receive the rents of the lord of a manor, if one of his tenants pay his rent to A. this is good payment to the lord. (*k*)

Where a perſon takes the ſecurity of an agent, *unknown to the principal*, and gives the agent a receipt as for the money due from the principal; in conſequence of which the principal deals differently with his agent on the faith of ſuch receipt, the principal is diſcharged although the ſecurity fail, if he can ſhow that he was injured by means of ſuch receipt, and the omiſſion of the party to inform him of the truth in due time.

Thus, in the caſe of *Wyatt* v. the *Marquis* of *Hertford*, (*l*) which was an action of *aſſumpſit* for work and labour. The facts were, that the plaintiff, who had been employed to do certain work for the defendant, after its completion ſent in the amount of his demand to the Marquis's ſteward, who thereupon gave him his own draft on a banker, and the plaintiff gave him in return a receipt for the money on account of the defendant. The draft was diſhonoured, and returned to the ſteward by the plaintiff, who accepted another draft from him for the amount, payable 21 days after date, without making any repreſentation of the matter to the defendant. The ſecond draft was alſo refuſed payment; and the ſteward becoming inſolvent, application was then made to the defendant, who reſiſted payment, on the ground, that the ſteward had more than ſufficient funds of the defendant's in his hands at the time of giving the firſt draft to have ſatisfied the plaintiff's demand, and had gone away much in arrear to the defendant on the balance of his accounts. A verdict was given for the defendant. But, upon a motion for a new trial, Lord *Ellenborough*, Ch. J ſaid, "That there muſt be a new trial; for on reviſing his note of the evidence, it did not appear that the defendant was in any way prejudiced by his ſteward having given his own ſecurity to the plaintiff, and taken the latter's receipt. That if it had appeared that the defendant had in the interval inſpected the ſteward's accounts, and had in any manner dealt differently with him on the ſuppoſition, that this demand had been ſatisfied as the receipt im-

(*i*) 1 *Salk.* 289. *Bul. N. P.* 35. (*k*) Per Powys, *Juſt. Holt*, 462.
(*l*) 3 *Eaſt*, 147.

ported,

ported, no doubt the defendant would have been discharged; for it was clear that the steward had sufficient money of the defendant's in his hands to answer the demand."

3. *In what Cases a Factor, or Agent, may sue, or be sued upon Contracts, &c. made with him on Account of his Principal.*

Where a factor to one beyond sea buys or sells goods for his principal, he may sue or be sued in his own name; for the credit will be presumed to be given to him in the first case; and in the last, the promise will be presumed to be made to him; and the rather so, as it is so much for the benefit of trade. (*m*)

It has also been determined, (*n*) "that a factor, having money due to him from his principal, who receives cloths, and is authorised to sell them in his own name, but makes the buyer debtor to himself, though he is not answerable for the debts, yet he has a right to receive the money: his receipt is a discharge to the buyer; and he has a right to bring an action against him to compel the payment; and it would be no defence for the buyer in that action to say, that, as between him and the principal, he (the buyer) ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that but where the factor has nothing due to him." And in the same case, it was observed by Lord *Mansfield*, "that there is no case in law or equity, where a factor having money due to him to the amount of the debt in dispute, was ever prevented from taking money for cloths in his hands."

So, a broker, who has advanced money on goods, may declare on a contract respecting the sale of them in his own name, though in the sale-note the name of the principal is inserted.

Thus, in the case of *Atkyns and Another* v. *Amber*, (*o*) where the declaration stated, "That, in consideration the plaintiffs would sell to the defendant a cargo of *Memel* timber, the defendant undertook to pay them with a bill at two months, the amount of the

(*m*) Gonzales *v.* Sladen. *Salk. M. S. S. Bul. N. P.* 130. *Bac. Abr. tit. Merchant and Merchandize. B.*

(*n*) *Per Curiam in* Drinkwater *v* Goodwin. *Cowp.* 255. *See also Loft.* 331. *S. P.* 2 *Esp. Rep.* 493.

value of the timber. It then averred the delivery of the timber, and assigned a breach in the not giving the bill as agreed." On the trial before *Eyre*, Ch. J. it appeared, that one *Hippius*, a timber merchant, had employed the plaintiffs as his brokers; and that they were in the habit of advancing him money on the credit of the cargoes he expected to arrive. On the 2d *December* 1795, *Hippius* was in the plaintiffs' debt; and he, having occasion for further assistance, applied to them to advance him 540*l.* which they did accordingly by accepting two bills to that amount. *Hippius* then gave them a written authority to dispose of a cargo of timber of his on board the *Sally*, on account of their engagements for him. This timber was afterwards sold by the plaintiffs to the defendant; and the sale-note was, "of *so much timber sold by the plaintiffs*, "*on account of J. G. Hippius; bill at two months.*"

On the part of the defendant it was contended, that there was a variance between the contract stated in the declaration, and the one given in evidence; and that therefore the plaintiffs ought to be nonsuited.

Eyre, Ch. J. said, "The sale-note appears to be a sale by *Hippius*; and if it could be proved that, by supposing the contract to be with *Hippius*, the defendant suffered, the defendant should be at liberty to set up that sale against the plaintiffs: but no such thing is alleged. It is proved that the plaintiffs had at least a special property in the timber; the sale was therefore theirs, and I am of opinion it is not a variance."

So, in the case of *Banfill* v. *Leigh and Another*, (*p*) where A. and B. assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same, under which the plaintiff submitted to arbitration the matters in difference subsisting between his principals and the defendants; and the plaintiff and defendants mutually promised to perform the award. The arbitrator awarded a sum of money to be paid by the defendants to the plaintiff as such attorney, and the action was brought in his name for the recovery of that sum. The Court held, that the action was well brought in the name of the plaintiff.

An agent is not liable to be sued upon contracts made by him on behalf of his principal, if the name of the principal is disclosed

(*p*) 8 *Term Rep.* 571.

and

and made known to the perſon contracted with, at the time of entering into the contract.

Thus, in the caſe of *Owen* v. *Gooch*, (*q*) which was an action of *aſſumpſit* for work and labour, and goods ſold and delivered. The defence relied upon was, that though the work had been ordered by the defendant, yet that it had not been ordered for himſelf, but for a perſon of the name of *Tippell*, and had been done at *Tippell*'s houſe at *Walthamſtow*; and that the plaintiff, at the time of the order, was informed that the work was on *Tippell*'s account: and the entry in the plaintiff's book was, "Mr. *Tippell*, by the order of *Gooch*."

The counſel for the plaintiff contended that the name of *Tippell* being prefixed to the order, was by no means a proof that the credit was given to him, but was merely identifying the order; that *Tippell* might be a perſon totally unknown to the plaintiff, but to whom *Gooch*, the defendant, was certainly known; ſo that the goods muſt be deemed to be ordered on *Gooch*'s credit.

For the defendant it was inſiſted that *Gooch* by the order appeared to be only the agent, and the goods to have been furniſhed on *Tippell*'s account.

Lord *Kenyon*, Ch. J. "The goods are ordered by *Gooch*, but at the time it is not pretended that they were for his own uſe; they were ordered for *Tippell*, and the entry is made in his name. We muſt keep diſtinct the caſes of orders given by the parties themſelves, and by others, as their agents. If the mere act of ordering goods was to make the party who ordered them liable, no man could give an order for a friend in the country, who might requeſt him to do it, without riſk to himſelf. If a party orders goods from a tradeſman, though in fact they are for another, if the tradeſman was not informed at the time that they were for the uſe of another, he who ordered them is certainly liable; for the tradeſman muſt be preſumed to have looked to his credit only. So, if they were ordered for another perſon, and the tradeſman refuſes to deliver them but on the credit of the perſon who orders them, there is then no pretext for charging ſuch third perſon: or, if goods are ordered to be delivered on account of another, and, after delivery, the perſon who gave the order refuſes to inform the tradeſman who the perſon is, in order that he may ſue him; under ſuch cir-

(*q*) 2 *Eſp. Rep.* 567.

cumſtances

cumſtances he is himſelf liable: but wherever an order is given by one perſon for another, and he informs the tradeſman who that perſon is, for whoſe uſe the goods are ordered, he thereby declares himſelf to be merely an agent, and there is no foundation for holding him to be liable. In this caſe, *Owen*, (the plaintiff) was informed of all the circumſtances that *Gooch* was giving the order for *Tippell*; the goods are ſent to *Tippell*'s houſe, and the entry made in his name. I think there is no colour for making *Gooch* the debtor."

So, where money is paid by miſtake to an agent for the uſe of his principal, and the agent has paid it over, he is not liable in an action by the perſon who miſpaid it; becauſe it is juſt that one man ſhould not be a loſer by the miſtake of another; and the perſon who made the miſtake is not without redreſs, but has his remedy over againſt the principal. On the other hand it is juſt, that as the agent ought not to loſe, he ſhould not be a gainer by the miſtake: and therefore, if, after the payment ſo made to him, and before he has paid the money over to his principal, the perſon corrects the miſtake, and gives him notice not to pay it over to his principal; the agent cannot afterwards pay it to his principal, without making himſelf liable to the real owner for the amount. (*r*)

The mere circumſtance of paſſing ſuch money in *account*, or *making reſt*, without any new credit given, freſh bills accepted, or further ſum advanced for the principal, in conſequence of it, is not equivalent to the payment of it over to the principal.

Thus, in the caſe of *Buller* v. *Harriſon*, (*s*) which was an action for money had and received, brought by the plaintiff againſt the defendant, to recover back a ſum of 2100*l.* paid him as due upon a policy of inſurance, as *agent* for the aſſured Meſſrs. *Ludlow* and *Shaw*, reſident at *New-York*. This ſum the plaintiff had paid, thinking the loſs was fair. Notice of the loſs was given by the defendant to the plaintiff on the 20th of *April*; part of the money was paid at that time, and the remainder on the 6th of *May* following; on which day the defendant paſſed the whole ſum in his account with Meſſrs. *Ludlow* and *Shaw*, and gave credit to them for it againſt a ſum of 3,000*l.* in which they ſtood indebted to him. On the 17th of *May*, notice was given by the plaintiff to the de-

(*r*) *Per Lord* Mansfield. *Cowp.* 566. 568. *See alſo* Sadler *v.* Evans, 4 *Burr.* 1984. *Bul. N. P.* 133. *S. P.* (*s*) *Cowp* 565.

fendant

fendant that it was a foul loſs. At this time nothing had happened to alter the ſituation of the defendant, or to make it different from what it was on the 20th of *April*: he had accepted no freſh bills, advanced no ſum of money, nor given any new credit to his principals; but affairs between them and him remained preciſely in the ſame ſituation as on the 20th of *April*. The queſtion at the trial was, whether this action could be maintained againſt the defendant, as *agent* of the inſured; which depended on this; whether the defendant's having placed this money to the account of his principals, in the manner before ſtated, was equivalent to a payment of it over.

Lord *Mansfield*, Ch. J. "It is argued that this is not a mere *placing to account*, but a *making reſt*. If it were, it would not vary the caſe a ſtraw. There was no new credit, no acceptance of new bills, no freſh goods bought, or money advanced. In ſhort, no alteration in the ſituation which the defendant and his principals ſtood in towards each other on the 20th of *April*. What then is the caſe? The defendant has truſted *Ludlow* and Co., and given them credit. He traffics to the country where they live, and has agents there, who know how to get the money back. The plaintiff is a ſtranger to them, and never heard of their names. Is it conſcientious then, that the defendant ſhould keep money which he has got by their miſrepreſentation, and ſhould ſay, though there is no alteration in my account with my principal, this is a hit; I have got the money, and I will keep it? If there had been any new credit given, it would have been proper to have left it to the jury to ſay, whether any prejudice had happened to the defendant by means of this payment: but here no prejudice at all is proved, and none is to be inferred. Under theſe circumſtances, I think that the defendant has no defence in point of law, and in point of equity and conſcience he ought not to retain the money in queſtion." The reſt of the Court were of the ſame opinion.

Where money is paid to an agent, or ſervant, and he miſapplies it, the perſon paying it has his remedy againſt the principal, or agent, at his election.

Thus, in the caſe of *Cary* v. *Webſter*. (*t*) The defendant was a clerk of the *South Sea* Company, and took in the payments on the third ſubſcription: the plaintiff paid him 620*l*., and he, by miſtake never entered it in the book, but however paid it over to the com-

(*t*) *Stra.* 410.

pany.

pany. The Chief Juſtice ruled, that no action would lie againſt him; that if he had not paid it over, the plaintiff would have had his option, either to charge him or the Company; as in the common caſe of payment to a goldſmith's ſervant, who does not carry it to the account of his maſter, the party has an election to go againſt either: he may charge the ſervant, becauſe till the money is paid over the ſervant receives it to his uſe; or he may paſs by the ſervant, and make his demand upon the maſter, becauſe the payment to the ſervant is made in confidence of the credit given him by the maſter.

Though in general an agent is not liable to be ſued upon a contract made by him, on behalf of his principal, yet if he make an abſolute engagement to perform it *perſonally*, he may be ſued upon ſuch engagement.

Thus, in the caſe of *Thomas* v. *Biſhop*, (*u*) where one *Mildmay*, agent to the *York Buildings* Company, reſiding in *Scotland*, drew a bill of exchange in favour of J. S. on their caſhier in *London*, which bill ran thus: "To Mr. *H. Biſhop*, caſhier to the Honour-"able Governor and Aſſiſtants of the *York Buildings* Company, "at their houſe in *Winchester-Street*, *London*. Pay to J. S. or his "order, 200*l.*, and place it to the account of the *York Buildings* "Company, for value received, as *per* advice." Mr. *Biſhop* accepted the bill generally, viz. "Accepted, *H. Biſhop*." The queſtion was, whether this general acceptance ſhould charge *Biſhop* in his own right? It was ſaved for the judgment of the court, after a verdict at *niſi prius* for the plaintiff; and it was reſolved by the Court that he was *perſonally* liable.

It is alſo ſaid, (*v*) "that if a ſervant makes a written undertaking in this form: "*Memorandum, that I have* received of J. S. to the uſe of my maſter, the ſum of 40*l.*, to be paid at *Michaelmas* following." The ſervant is liable hereby; for though in the memorandum it is ſaid to be to the uſe of his maſter, yet the payment being indefinite, muſt be underſtood to be by him who ſealed the bill: but if it had expreſſed to be repaid by his maſter, that the ſervant would not have been liable."

(*u*) 2 *Kel.* 136. *pl.* 116. 2 *Barnard. K. B.* 320. *S. C. Stra.* 955. *S. C.*

(*v*) Talbot v. Godbolt, *Yelv.* 137. 2 *Kel.* 138. *But ſee Prec. Chan.* 46. *Abr. Eq.* 308.

And

And in the case of *Appleton* v. *Binks*, (*w*) which was an action of *covenant* upon articles of agreement between the plaintiff on the one part, and the defendant, *by the name and description* of T. Binks, *&c.* (*for and on the part and behalf of Lord Viscount Rokeby,*) of the other part; whereby the defendant for *himself, his heirs*, &c. *on behalf of the said Lord Rokeby*, covenanted with the plaintiff that the said *Lord Rokeby* should pay a certain sum of money to the plaintiff, in consideration of the conveyance in fee of certain premises, &c.

On the part of the defendant it was contended, that the action did not lie against him, upon articles describing him to be merely agent for another. But the Court said, "that it was impossible to contend that where one covenants for another, he is not to be bound by it; the covenant being in his own name, "for himself, his heirs," &c. There was nothing unusual or inconsistent in the nature of the thing, that one should covenant to another that a third person should do a certain thing, as that he should go to *Rome*. The party to whom the covenant is made may prefer the security of the covenantor to that of his principal. Here the defendant covenants for himself, not in the name of his principal, and puts his own seal to it. There is nothing against law in it, if he will bind himself for his principal. He probably consented to it upon an indemnity."

4. *Of Sales, &c. on a* del credere *Commission.*

Del credere is an *Italian* mercantile phrase, (*) and signifies a particular kind of credit or responsibility, and when applied to the situation of a factor, it is understood in the following sense: a factor who has *general* orders to dispose of goods for his principal, and, in consideration of being paid an additional commission, (*x*) acts in nature of an insurer to him, by taking upon himself the risk of bad debts; and thereby making himself *absolutely* liable, in the first instance, for the payment of the price of such goods, in the same manner as if he were himself the purchaser, and was debited for them by the principal as such. (*y*)

(*w*) 5 *East Rep.* 148. * *Vide* 6 *Bro. P. C.* 287. *oct. ed.*

(*x*) *The* del credere *commission is usually* 1½ *or* 2 per cent *in addition to the customary commission for selling, &c.* (*y*) *Vide* 1 *Term Rep.* 112.

Thus,

Thus, in the case of *Mackenzie* and another v. *Scott*, (z) where a factor, under a commission *del credere*, sold goods and took accepted bills from the purchasers, which he indorsed to a banker at the place of sale, and received the banker's bill, (payable to the factor's order) on a house in *London*. This last bill the factor indorsed and transmitted to his principal, who got the same accepted; but the acceptor and drawer afterwards failed. It was held, that the factor was answerable for the amount of the bill; being personally liable, under his commission *del credere*, to satisfy his principal the price of the goods sold.

5. *Of Sales, &c. by Auctioneers.*

An auctioneer employed to sell the goods of a third person by auction, may maintain an action in his own name, for *goods sold and delivered* against a buyer, though the sale be at the house of such third person, and the goods known to be that person's property.

Thus, in the case of *Williams* v. *Millington*, (a) which was an action of *assumpsit* for goods sold and delivered, and money paid. The plaintiff was an auctioneer, and employed by one *Crown* to sell his goods by auction; the sale was at the house of *Crown*, and the goods were known to be his property; the defendant bought goods to the amount of 7*l.* 9*s.* 6*d.* and after packing them in a cart, which he had prepared ready at the door, paid the plaintiff 2*l.* 4*s.* 6*d.* in cash, and put a receipt into his hand for five guineas, as for a debt due from *Crown* to the defendant. While the plaintiff was hesitating about the propriety of taking the receipt in payment, the defendant drove off the cart with the goods. Afterwards, the plaintiff being called upon by *Crown*, paid to him (who refused to accept the receipt) the whole sum for which the goods were sold to the defendant, and brought this action to recover the five guineas, in lieu of which the receipt was offered.

The question was, whether the action was properly brought in the name of the auctioneer?

Lord *Loughborough*, Ch. J. said, "This case arises on circumstances which do not often happen; the defendant having practised a trick upon the plaintiff by driving off the goods in a cart, and at

(z) 6 *Bro. P. C.* 2d *oct. ed.* (a) 1 *H. Bl.* 81.

the

the ſame time holding out the money in ſight, together with the paper containing a receipt for the debt due from *Crown*, the owner. Though the defendant ſhall not be ſuffered to avail himſelf of ſuch conduct, yet I entertain no ſort of doubt on the general queſtion, being extremely clear that an auctioneer has a poſſeſſion, coupled with an intereſt, in goods which he is employed to ſell, not a bare cuſtody like a ſervant or ſhopman. There is no difference whether the ſale be on the premiſes of the owner, or in a public auction-room; for on the premiſes of the owner an actual poſſeſſion is given to the auctioneer and his ſervants by the owner, not merely an authority to ſell. I have ſaid a poſſeſſion coupled with an intereſt; but an auctioneer has alſo a ſpecial property in him, with a lien for the charges of the ſale, the commiſſion, and the auction-duty, which he is bound to pay. In the common courſe of auctions, there is no delivery without actual payment; if it be otherwiſe, the auctioneer gives credit to the vendee, entirely at his own riſk. Though he is like a factor, therefore, in ſome inſtances, in others the caſe is ſtronger with him than with a factor, ſince the law impoſes the payment of a duty on him, and the credit in caſe of a delivery, without the recompence of a commiſſion *del credere*. It is not a true poſition that two perſons cannot bring ſeparate actions for the ſame cauſe: the carrier and the owner of goods may each bring actions on a *tort*; the factor and owner may each have actions on a contract. I am therefore, upon the whole, decidedly of opinion, that this action may well be maintained." The other Judges concurring, judgment was given for the plaintiff.

Upon the ſame principle an auctioneer is perſonally liable to be ſued for the recovery of the depoſit money, where a valid title cannot be made to a purchaſer.

Thus, in the caſe of *Burrough* v. *Skinner*. (*b*) The defendant was an auctioneer; and, in that character, had ſold to the plaintiff an intereſt in land, for which the plaintiff had paid him a depoſit of 50*l*.; but, upon an objection to the title, and the want of diſcloſure of certain circumſtances which ought to have been diſcloſed at the time of the bidding, the plaintiff (the purchaſer) declined going on with the contract; and, in the opinion of the Court, ſhe had ſufficient reaſon for ſo doing. She therefore re-

(*b* 5 *Burr.* 1639.

quired

quired the auctioneer to pay her back her depoſit of 50*l.*; the auctioneer refuſed; whereupon the bidder brought this action againſt him to recover it. The auctioneer paid 8*l.* into court: the cauſe was tried, and the plaintiff obtained a verdict. The auctioneer moved for a new trial; and had a rule to ſhow cauſe.

But, upon ſhowing cauſe, the Court were clear that the action lay againſt the auctioneer. They ſaid, "The money does not appear to have been paid over by him to his principal: but if it had been ſo, yet the objection appears to have been made before it either was or ought to have been ſo paid over. He was a ſtakeholder, a mere depoſitary of the 50*l.*, and ought not to have parted with it till ſuch time as the ſale ſhould be finiſhed and completed, and it ſhould appear in the event to whom it properly belonged." They alſo thought that the auctioneer had acknowledged himſelf to be liable to the action by paying money into court. The rule was therefore diſcharged, and the plaintiff had judgment.

So, where an auctioneer employed to ſell fixtures, has notice that they do not belong to his principal, and he, notwithſtanding, proceeds to ſell them, he is *perſonally* liable to the real owner in an action of *aſſumpſit* for the produce of the ſale. (*c*)

So, where an auctioneer does not diſcloſe the name of his principal at the time of the ſale, and the contract is not completed, he is perſonally liable to an action of damages.

Thus, in the caſe of *Hanſon* v. *Roberdeau*, (*d*). The plaintiff had bought a *poſt obit* bond at an auction, where the defendant acted as auctioneer, and the bond not being aſſigned within the time agreed upon by the conditions of ſale, the plaintiff brought the preſent action of *aſſumpſit* againſt the auctioneer.

The name of the principal was not mentioned at the time of the ſale, and one of the conditions was, that 25*l. per cent.* ſhould be paid as a depoſit; but although the plaintiff was to give 645*l.* for the bond, only 50*l.* was paid down, which it was proved the defendant agreed to accept as a depoſit.

Two objections were taken by the defendant's counſel; 1ſt. that the agreement was not complied with on the part of the

(*c*) Hardacre v. Stewart, 5 *Eſp. Rep.* 103. (*d*) *Peake's Cas. N.P.* 120.

plaintiff,

plaintiff, the whole depoſit money not being paid; 2dly, that the principal, and not the auctioneer, was liable to an action.

Lord *Kenyon*, Ch. J. ſaid, "The defendant, after having agreed to take 50*l.* for the depoſit, cannot object that too little was paid. And though where an auctioneer names his principal, it is not proper that he ſhould be liable to an action, yet it is a very different caſe when the auctioneer ſells the commodity without ſaying on whoſe behalf he ſells it; in ſuch a caſe the purchaſer is intitled to look to him *perſonally* for the completion of the contract."

An action does not lie againſt an auctioneer, at the ſuit of his employer, for ſelling goods at the higheſt price bid for them under the uſual conditions of ſale, though he might have had the owner's expreſs directions not to let them go under a larger ſum named. He would, however, be liable, if the owner had directed him to *ſet* the goods *up* at a particular price, and not lower.

Thus, in the caſe of *Bexwell* v. *Chriſtie*, (*e*) which was an action on the caſe againſt the defendant (an auctioneer) for negligently ſelling the plaintiff's gelding, which he had directions not to let go under 15*l.*, for a leſs ſum, *viz.* 6*l.* 16*s.* 6*d.* contrary to ſuch directions. The conditions of ſale were, "That the goods ſhould be ſold to the *beſt bidder*." Lord *Mansfield*, ſaid: "There is no expreſs undertaking on the part of the defendant, nor is it a direction that there ſhould be no bidding under 15*l.* which might be fair: but the direction given to the defendant is, "Not to let the horſe go under 15*l.*;" which implies there might be a bidding under that ſum. The queſtion then is, whether the owner can privately employ another perſon to bid for him. The baſis of all dealings ought to be good faith; ſo, more eſpecially in theſe tranſactions, where the public are brought together upon a confidence that the articles ſet up to ſale will be diſpoſed of to the higheſt real bidder: that could never be the caſe, if the owner might ſecretly and privately inhance the price, by a perſon employed for that purpoſe; yet tricks and practices of this kind daily increaſe, and grow ſo frequent, that good men give into the ways of the bad and diſhoneſt in their own defence. An owner of goods ſet up to ſale at an auction never yet bid in the room for himſelf. If

(*e*) *Cowp.* 395.

ſuch a practice were allowed, no one would bid. It is a fraud upon the ſale, and upon the public. The diſallowing it is no hardſhip upon the owner. For if he is unwilling his goods ſhould go at an under price, he may order them to be ſet up at his own price, and not lower: ſuch a direction would be fair: or he might do as was done by Lord *Aſhburnham*, who ſold a large eſtate by auction; he had inſerted in the conditions of ſale, that he himſelf might bid once in the courſe of the ſale: and he bid at once 15 or 20,000*l.* Such a condition is fair; becauſe the public are then appriſed, and know upon what terms they bid. In *Holland* it is the practice to bid downwards. Therefore, upon full conſideration, I am of opinion, that a bidding for the owner in the manner contended for, and agreeable to the directions given in this caſe, would have been a fraud upon the ſale: and conſequently, that this action againſt the defendant as auctioneer, cannot be maintained." The other judges were of the ſame opinion.

An auctioneer having ſold an eſtate, received a depoſit of the purchaſer; but the title being diſcovered to be defective, an action was brought againſt him to recover back the amount of the depoſit, which he accordingly paid, together with the coſts of the action: it was ruled, (*f*) that the auctioneer could not recover the amount of the coſts againſt his principal in an action of *indebitatus aſſumpſit*, for money paid; but ſhould declare *ſpecially*.

So, where an auctioneer was employed to ſell an eſtate, the loweſt price of which was fixed by the owner, and written down by him on a piece of paper, which was put under a candleſtick at the time of ſale, with the privity of the auctioneer, but not ſigned by the owner, nor any notice in writing given to the auctioneer of the price ſo ſet down, nor had the auctioneer given the previous notice of the ſale to the collector of the duty, as required by the acts of the 19 Geo. III. c. 56. and 28 Geo. III. c. 37.: but being aſked at the ſale whether he had taken the proper precautions to avoid the duty in caſe there were no ſale, he ſaid, that it was his mode to fix a price under the candleſtick, and if the bidding did not come up to that price, it was no ſale or duty: In point of fact there was no ſale. The duty, however, did attach in conſequence of the auctioneer not having taken the precautions re-

(*f*) Spurrier *v.* Elderton, 5 *Eſp. Rep.* 1.

quired

quired of the owner by the ſtatutes under ſuch circumſtances, and the auctioneer was ſued for the duty on his bond to the crown, and compelled to pay it: the Court of *King*'s *Bench* (*g*) decided that the auctioneer could not recover it over againſt the owners, he having warranted that proper precautions had been taken to prevent the duty attaching in the event; though both parties were miſtaken in the law.

6. *Of Contracts and Agreements between Principal, Factor, and Agent* inter ſe: *And of their reſpective Rights and Remedies*, &c. *And, Firſt, of a Factor or Agent's liability on a Promiſe to Indemnify his Principal upon a Reſale of Goods*, &c.

Where a broker buys goods for his principal, and agrees for a certain *per centage* to indemnify him from any loſs on the re-ſale of them; if the principal has a fair opportunity of ſelling the goods to advantage, but neglects it, the broker is diſcharged, though the principal afterwards ſells them at a loſs.

Thus, in the caſe of *Curry* v. *Edenſor*, (*h*) where it appeared that the plaintiff, through the medium of the defendant, his broker, had made two purchaſes of cotton, the one of 50 bags from *Bateman*, the other of 40 bags from *Entwiſle*: and the defendant engaged for ½ *per cent* to indemnify the plaintiff from any loſs on the re-ſale of them. It appeared that the market-price of cotton had riſen gradually for about three weeks after the purchaſe, of which advantage the plaintiff did not avail himſelf, though there was evidence to ſhow that he was in the habit of attending the market, but he waited for ſome weeks longer, when he re-ſold them at a conſiderable loſs: to recover which difference the preſent action was brought upon the defendant's contract of indemnity. A verdict was given for the plaintiff. But, upon a motion for a new trial, Lord *Kenyon*, Ch. J. ſaid, "I think, on the fair conſtruction of the contract of indemnity, that the defendant is diſcharged under the circumſtances which have happened; for the fair import of the con-

(*g*) Capp *v.* Topham, 6 *Eaſt Rep.* 392. (*h*) 3 *Term Rep.* 524.

tract is, that the defendant ſhould guarantee to the plaintiff that he ſhould be enabled to make a profit of the cotton; and there was evidence to ſhew that there had been a gradual riſe in the market for three weeks afterwards, during which time the plaintiff might have made conſiderable profits if he had choſen to avail himſelf of the opportunity. And having loſt that opportunity, I think, he cannot now have recourſe to the defendant. If the agreement had been that the defendant was bound to give the plaintiff information reſpecting the time when theſe goods could be re-ſold to the greateſt advantage, there would have been ſome ground for the plaintiff's argument: but that was not neceſſary; and, indeed, it appears that the plaintiff muſt have been fully appriſed of the gradual riſe of the market, as he was in the habit of attending it. If this were not ſufficient to ſatisfy the contract of indemnity, no other line could be drawn. Therefore I am of opinion that there ſhould be a new trial."

Buller, J. "The meaning of the guarantee ſeems to me to be this, 'I will engage (ſaid the defendant) that you may ſell the cottons for as much as you gave for them.' That is the full extent of the contract: if ſo, it remains to be inquired whether the plaintiff could have ſold the goods at an advanced price, and whether or not he has been guilty of negligence in not having ſo done. There is no doubt upon the evidence but that he might have re-ſold them at a conſiderable advance. But it is objected that it does not appear that the plaintiff knew of the riſe of the market, and that the defendant was bound to give him notice of it. To this it may be anſwered, that the plaintiff, having engaged in a mercantile tranſaction, and having ſpeculated on the riſe and fall of the market, was bound to take notice of the true ſtate of it. In ſuch a caſe as this, where there was a continued advance in the price for three weeks, it was not neceſſary for the defendant to call on the plaintiff to re-ſell the goods. If indeed there had been a ſudden riſe in the market for a few hours, or for one morning, and that was known to the defendant and not to the plaintiff, the former would not have been diſcharged, unleſs he had informed the latter who then neglected to take advantage of it. But here it is clear, upon the evidence, that the plaintiff might have made ſome gains if he had choſen to avail himſelf of the opportunity. He neglected, however, to take that opportunity, and choſe to ſpeculate ſtill further, but that he could not do at the defendant's

fendant's risk; for if he *might* have profited by a re-sale of his goods and did not, that is sufficient to discharge the defendant." A new trial was accordingly granted.

2d. *Of the Remedy against a Factor or Agent for not Accounting, and for Negligence, &c.*

Where goods are delivered to a Factor or agent to be sold and disposed of for his principal, the law implies a promise on the part of the factor that he will render an account of them whenever called upon by the principal: But if he refuse to account, he is liable to an action of *assumpsit* for the breach of his implied promise. (*i*) If, however, there be a long and intricate account between the principal and his factor, the proper remedy is by action of *account*, wherein auditors are appointed by the court to inspect and examine the accounts of the parties, and to make all just allowances. (*k*)

So, where a factor or agent has actually received money on account of his principal and refuses to pay it over, an action of *indebitatus assumpsit* lies against him for so much money had and received. (*l*)

So, where A. appointed B. his deputy to an office; and it was agreed that B. should account with A. for all fees, &c *according to the table of fees belonging to such office*, and pay him three-fourth parts thereof, and retain the other fourth part for his trouble. Certain fees were received by B. which he insisted upon being solely entitled to, because they were *not contained in the table*; but it was held, (*m*) that B. should account with A. for all fees ascertained by the table, according to the table; and for all fees not mentioned therein, according to his receipts, and pay over three-fourths of the whole to A.

(*i*) *See* 1 *Salk.* 9. *Carth.* 89. *S. C. where the promise was* express. *But actions are now frequently brought upon* implied *promises only.*

(*k*) 12 *Mod.* 517. Godfrey *v.* Saunders, 3 *Wils.* 94. 117. *Bac. Abr. tit.* Accompt.

(*l*) 2 *Sho.* 301. *pl.* 297. 2 *Mod.* 263. *Com. Dig. tit.* Action of Assumpsit. *A.* 1.

(*m*) Machen *v.* Stanyon, 1 *Bro. P. C.* 133. 8vo *ed. See also* Baldwin *v.* Gilburn, 2 *Str.* 1027. *S. P. in every* [illegible] *Vide* [illegible] *cited* [illegible] *the opinion of*

We are now to consider in what cases a factor or agent is answerable to his principal for neglect of duty.

If a merchant directs his factor or correspondent to insure, and he neglects doing so, he is liable to an action for this neglect of duty.

Thus, in the case of *Smith* v. *Lascelles*, (*n*) which was an action on the case for neglecting to make an insurance on the freight of goods shipped from *Dominica* to *London*. The facts were, that the plaintiff, being indebted to the defendant in 850*l*. in *February* 1785 mortgaged to him his interest in the goods and freight, by way of security; in which mortgage was contained a proviso, that the deed should be void in case of payment in *August* 1785. In *July* 1785, the plaintiff in a letter inclosing the bills of lading, desired the defendant to procure an insurance on the goods and freight, which letter could not have been received before the mortgage became absolute. The defendant did cause insurance to be made on the goods, though not on the freight. At the trial, proof was given of a letter having been received by the defendant from the plaintiff, but it did not appear whether it was the letter in question.

A verdict having been found for the plaintiff, a motion was made to set aside the verdict; but the court refused the rule, and held, that the plaintiff was entitled to recover. *Buller*, J. said, "It is now settled as clear law, that there are three instances in which such an order to insure must be obeyed. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet if the course of dealing between them be such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. Thirdly, If the merchant abroad send bills of lading to his correspondent

(*n*) 2 *Term Rep.* 187. *See also* Delancy v. Stoddart, 1 *Term Rep.* 22. *S. P.* here,

here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction. It is true, as it has been observed, that unless something has been held out by the person here to induce the other to think that he will procure insurance, he shall not be compelled to insure. But if the commission from the merchant abroad consist of two parts, the one to accept the bill of lading the other to cause an insurance to be made, the correspondent here cannot accept it in part, and reject it as to the rest. If such be the law on this subject, the fact in this case is clear; for, with regard to the letter, there is no pretence for saying, that any other was received by the defendant from the plaintiff, but that containing the order of insurance, and the jury have so found it.

So, where a merchant here had accepted an order for insurance, and limited the broker to too small a premium, in consequence of which no insurance could be procured, the court held, that the merchant was liable to make good the loss to his correspondent. (*o*)

So, where a merchant directs his factor (*p*) or correspondent to insure, and he charges him with it as if done, and a loss happens; he shall be charged as insurer: but if the factor employs an agent, this equity will not extend to that agent.

But, if an agent, to whom orders to insure are sent, does what is usual to get the insurance made, that is sufficient; (*q*) because he is no insurer, and is not obliged to get insurance at all events. Thus, if he send to *Lloyd*'s, and the underwriters refuse to take the risk at any premium; and he afterwards send to get insurance done at *Newcastle*, he has done his duty, and can never afterwards be charged in this action; more especially if the plaintiff adopt and approve his acts.

And in order to maintain an action on the case against an agent for negligence, the principal must show, that the agent was guilty either of a breach of *positive orders*, *gross negligence*, or *fraud*.

(*o*) Wallace *v.* Tellfair, 2 *Term. Rep.* 188. *n. a.*
(*p*) Tickel *v.* Short, 2 *Vez.* 239.
(*q*) Smith *v.* Cologan, 2 *Term Rep.* 188. *n. a.*

Thus, in the case of *Moore* v. *Mourgue*, (*r*) which was an action brought by the plaintiff, who was a merchant at *Alicant*, against the defendant, his agent in *London*, for misbehaviour, in not insuring the plaintiff's goods agreeable to his directions. The goods were a cargo of fruit; and by the letters produced in evidence, it did not appear that the plaintiff had given the defendant any particular directions how or with whom to insure; but only generally, to insure the cargo. The defendant insured with the *London Assurance Office*, who, in policies upon fruit, always put in an exception, "free from particular average." This policy was made therefore with that exception. The loss was not entirely a total loss; for though the goods were at first under water, some were saved; but those that were damaged would not pay the salvage of them. Upon the trial the jury found a verdict for the defendant; and one of them said, the ground of their verdict was, because they thought he had acted *bonâ fide* to the best of his judgment.

The plaintiff moved for a new trial; but the court refused the rule. And Lord *Mansfield*, said, "To maintain this action, the defendant must be guilty either of a *breach of orders*, *gross negligence*, or *fraud*. Now my direction to the jury was general; that if they thought there was gross negligence, or the defendant had acted *malâ fide*, they should find for the plaintiff: If, on the contrary, they were of opinion that he had acted *bonâ fide*, and to the best of his judgment, then they should find for the defendant. In delivering their verdict they say, they did not think the defendant guilty of gross negligence, or that he acted *malâ fide*: The court therefore will not say so. The plaintiff, if he pleased, might have given orders to the defendant not to insure at the *London Insurance Office*; but at some other office where this exception would not have been insisted on. But he gives no directions at all. Therefore he left it to the discretion of his correspondent, who, if he meant no fraud, was at liberty to elect between the underwriters. It seems the *Exchange Assurance* and the *London Assurance Office* differ in the form of their policy: but though the one runs a risk which the other does not, the premium is the same. There could be no temptation therefore to the defendant as to his choice between them. If upon all the circumstances, the jury had found for the plaintiff, it might have been a cast whether the court would

(*r*) *Coup.* 479.

have

have granted a new trial. A *fortiori*, in a hard action, where, as no particular orders were given, there has certainly been no breach of orders; where the defendant appears to have acted *bonâ fide*, and where the plaintiff has himself been guilty of the first omission in giving no directions at all, there seems to be no ground for the court to interpose against the defendant. Therefore I am of opinion the verdict ought to stand."

A banker in *London* receiving bills from his correspondents in the country, to whom they had been indorsed, to present for payment, is not guilty of negligence in giving up such bills to the acceptor upon receiving a check upon a banker for the amount, although it turn out that such check is dishonoured.

Thus, in the case of *Russell* v. *Hankey*, (*s*) where it appeared that the defendants were bankers in *London* in correspondence with the plaintiffs, their customers in the country: that the bills in question, which had been indorsed to the plaintiffs in the course of negotiation, had been transmitted by them to the defendants in order to obtain payment from the acceptor, who resided in *London*, and to carry the amount to the account of the plaintiffs. That the defendants accordingly tendered the bills to the acceptor for payment, when he gave them a check upon a banker in *London* for the amount, upon the receipt of which check they delivered up to the acceptor the bills in question. It turned out that the check was dishonoured, the person on whom it was drawn having no account with the drawer. Upon these facts, which were not disputed, the plaintiffs contended, that the defendants had been guilty of negligence in giving up the bills for the check they had received in payment, without previously enquiring whether or not the check would be honoured. The defendants on the other hand insisted they had only done what was usual in the ordinary course of trade and business of bankers, and therefore ought not to be answerable for the event; and Lord *Kenyon*, Ch. J. before whom the cause was tried, being clearly of this opinion, the plaintiffs were nonsuited.

A motion was made to set aside the nonsuit upon the ground before stated. But the court said, "We dare not even grant a rule to show cause, as it would be putting the whole trade of *Lon-*

(*s*) 6 *Term Rep.* 12.

don

don in ſuſpence pending it. There is no ground to impute negligence to the defendants."

If an officer on foreign ſervice ſends in his reſignation to the agent of the regiment for the ſale of his commiſſion, the agent muſt take care to ſecure to him the purchaſe money.

Thus, in the caſe of *Sturdy* v. *Roſs*, (*t*) which was an action of *aſſumpſit* for money had and received. The action was brought by the plaintiff, who had been an enſign in the 54th regiment of foot, to recover from the defendant, who was agent to the regiment, the ſum of 400*l.* and intereſt, being the amount of the ſale of his commiſſion, on quitting the regiment.

For the plaintiff it was proved, that he being abſent in *America*, doing duty with the regiment, had tranſmitted to the defendant, as agent of the regiment, his reſignation.

On the other ſide, it was proved, that this reſignation is delivered to the colonel of the regiment, who accepts it, and ſends in with it to the war office a recommendation of the ſucceſſor; but it was ~~is was~~ in evidence, that no commiſſion is made out for the ſucceſſor, without a certificate that the money is lodged for the purpoſe of the purchaſe.

The money had in fact been paid to one *Cuthbert*, who had been in the ſervice of the defendant, and who, the plaintiff contended, was ſo at the time of the money paid; but the defendant relied, that after the reſignation was handed over by him to the colonel, his reſponſibility was at an end; and in the preſent inſtance, *Cuthbert* having been the private agent of the colonel, it was further relied, that the money had been paid to him in that capacity; ſo that if any perſon was liable it was the colonel. *Cuthbert had died inſolvent.*

An army agent alſo gave in evidence, that when he ſold a commiſſion, he ſecured the purchaſe money, unleſs where the parties ſettled it among themſelves; and that he had never received the reſignation of any commiſſion which another perſon had ſold.

Lord *Kenyon*, Ch. J. ruled, that where the officer was abſent on *foreign ſervice*, it was the duty of the agent, when the reſignation was ſent in to him, to take care that the purchaſe-money was properly ſecured to him, as otherwiſe the ſituation of officers abroad would be ſubjected to much riſk and inconvenience; that

(*t*) 1 *Eſp. Rep.* 450.

in

in the preſent inſtance, the defendant muſt be conſidered as adopting the acts of *Cuthbert*, and therefore liable for money received by him in that capacity. The jury found a verdict for the plaintiff for the whole ſum and intereſt.

Where A. entruſted B. with goods to ſell in *India*, agreeing to take back from B. what he ſhould not be able to ſell, and allowing him what he ſhould obtain beyond a certain price, with liberty to ſell them for what he could get, if he could not obtain that price. B. not being able to ſell the goods in *India* himſelf, left them with an agent to be diſpoſed of by him, directing the agent to remit the money to himſelf in *England*. It was held, (*v*) that A. could not maintain trover againſt B. for the goods.

3dly. *Of the Factor's Lien on the Goods, &c. of his Principal.*

A factor has a lien on goods conſigned to him, for the general balance due to him, as well as for incidental charges attending the particular goods in his hands: (*u*) But this lien remains ſo long only as he retains the poſſeſſion of the goods; for if he parts with the poſſeſſion he parts with his lien, becauſe it cannot then be retained as an *item* for the general account. (*w*)

In the caſe of *Drinkwater* v. *Goodwin*, (*x*) however, it was held, that a factor has a lien on the price of the goods in the hands of the buyer; for though he has not the actual poſſeſſion of them, yet if he has a power of giving a diſcharge, or bringing an action, he has a right to retain the money in conſequence of his lien, as much as a mortgagee has by the title deeds of an eſtate in his hands, though he is not in poſſeſſion.

But though the general rule of law be, that a factor has a lien on the goods of his principal for his general balance, yet this like

(*v*) Bromley *v.* Coxwell, 2 *Bos. and Pul.* 438.

(*u*) Kruger *v.* Wilcocks, *Ambl.* 252. 1 *Bur.* 494. 1 *Bl. Rep.* 104. 6 *Eaſt* 23 *in notis. S. C See alſo* Lickbarrow *v.* Maſon, 2 *Term Rep.* 63. *And the very elaborate and learned opinion delivered by Mr. Juſtice* Buller *on this caſe in the Houſe of Lords, as given in* 6 *Eaſt Rep.* 21 *n. a.*

(*w*) *Vide* Sweet *v.* Pym, 1 *Eaſt Rep.* 4. (*x*) *Cowp.* 251.

other

other general rules may be controlled by the agreement of the parties; as if A. depoſit goods with B. for ſale, and B. promiſe to pay the proceeds to A. when ſold; B. has no lien on theſe goods (if not ſold) for the balance of his general account ariſing upon other articles; the expreſs ſtipulation in this caſe negativing the general rule of law. (*y*)

So, a factor has no lien on goods for a general balance, unleſs they come into his *actual* poſſeſſion. (*z*) And if a factor accept bills drawn by his principal upon the faith of conſignments agreed to be made by the principal to the factor, and both of them become bankrupts before a cargo conſigned come into poſſeſſion of the factor, his aſſignees have no property in ſuch cargo, and cannot recover the produce of it againſt the aſſignees of the principal, if they have ſold it and received the purchaſe money. (*a*)

So, where a trader, after a ſecret act of bankruptcy, conſigns goods to a factor, who advances money thereon; the latter has no lien on ſuch goods, but muſt deliver them up to the aſſignees of the bankrupt trader. (*b*)

So, if A. employs a factor to ſell goods he has no lien upon them, in reſpect of any debt due for other goods ſold by him in *his own name* to A. on the account of another employer, previous to his being employed by A.

Thus, in the caſe of *Houghton* and another aſſignees of *Jackſon*, a bankrupt, v. *Mathews* and another, (*c*) which was an action of trover, in which it appeared, that the defendants who were brokers had on the 3d of *September* 1799 ſold a parcel of logwood and fuſtic to *Jackſon* the bankrupt; and on the 11th of the ſame month, a parcel of indigo; neither of which parcels were paid for at the time of *Jackſon*'s bankruptcy; the logwood and fuſtic was the property of a perſon of the name of *Greatham*, and the indigo of a perſon of the name of *Dixon*; both theſe parcels had been put into the hands of the defendants by the proprietors, to be ſold by them as brokers, and both ſales were effected in the names of the brokers only, it being their practice to ſell in their own name, where the party for whom they ſold was indebted to them. At the time of ſuch ſales,

(*y*) Walker *v.* Birch, 6 *Term Rep.* 258. *See alſo* Skiffken *v.* Wray, 6 *Eaſt Rep.* 371. (*z*) Kinloch *v.* Craig, 3 *Term Rep.* 119.
(*a*) Kinloch *v.* Craig, 3 *Term Rep.* 783. 4 *Bro. P. C.* 47. *Stated S.C.*
(*b*) Copeland *v.* Stein, 8 *Term Rep.* 199. (*c*) 3 *Bos. and Pul.* 485.

and

and when this action was commenced, there was a balance due both from *Greatham* and from *Dixon* to the defendants. Soon after the above sales, *Jackson*, the bankrupt, put into the hands of the defendants the indigo in question, to sell, as brokers; no advance being made by them upon the indigo, nor any debt existing between the defendants and *Jackson*, other than what was due to the former for the goods of *Greatham* and *Dixon*, purchased by *Jackson* of the defendants, as before mentioned. Indeed the commission to sell the indigo in question, was the first time the latter had ever employed the defendants as brokers. While the indigo in question still remained unsold in the hands of the defendants, as brokers, *Jackson* became a bankrupt. Upon this the plaintiffs, as his assignees, demanded the indigo, and tendered payment of any charges which might have been incurred in respect of that article; the defendants refused to deliver it up, claiming a lien upon it for the debt due from the bankrupt, in consequence of the goods of *Greatham* and *Dixon* sold to him, and which still remained unpaid for.

The court were of opinion, that the defendants had no lien for the debt due to *Greatham* and *Dixon*, and that the assignees were entitled to recover.

Chambre, J. said, "The question is, whether when a broker receives goods to sell for A. he is entitled to retain them though unsold, after a tender of all charges due in respect of those goods, on the ground of a lien for the price of other goods sold by him for B. to A. under a general authority from B. to sell, there being no general balance due from A. to the broker, and the broker not having sold the goods of B. under a *del credere* commission? I state the question thus, because I conceive that in the present case, the mere act of the bankrupt buying goods of the defendant did not constitute the relation of principal and factor between them. The demand of the defendant upon the first goods did not arise out of any course of dealing in the relation of principal and factor, but was as foreign to that relation as if it had arisen upon a legacy, or any other species of debt the most remote from that course of dealing. I do not find any authority for saying, that a factor has any general lien in respect of debts which arise prior to the time at which his character of factor commences; and if a right to such a lien is not established by express authority, it does not appear to me to fall within the general principle upon which the liens of factors have been allowed. It

terms

ſeems to me that the liens of factors have been allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their poſſeſſion, or which muſt come to their hands as factors; but debts which are incurred prior to the exiſtence of the relation of principal and factor, are not contracted upon this principle. And if the lien now contended for were allowed, inſtead of inducing perſons to place goods in the hands of factors, it would operate the contrary way, ſince it would tend to prevent inſolvent perſons from employing their creditors as factors, leſt the goods entruſted to them ſhould be retained in ſatisfaction of former debts. If this were the only point in this caſe, I ſhould be of opinion, that the defendants were not entitled to retain: but laying this point out of the queſtion, I ſtill think the debts due from the bankrupt, in reſpect of the goods ſold to him, are not to be conſidered as due to the defendants, ſo as to authorize them to ſet off ſuch debts, in an action brought againſt them by the bankrupt's aſſignees, and that the defendants have no property or intereſt whatever in thoſe debts. I never yet heard of a perſon being allowed to protect himſelf, by ſetting up debts in reality due to other perſons; or that a factor, having no demand on his principal, could, by tranſactions with a third perſon, create a new intereſt in himſelf."

But the aſſignee of a policy of inſurance on goods, (*d*) who becomes ſuch by the indorſement to him of the bill of lading of the goods by the conſignor, after he had directed his correſpondent to make the inſurance, takes it ſubject to the lien of the correſpondent of the conſignor for his general balance; and can only claim, ſubject to that lien, the money received on ſuch policy by the broker, in whoſe hands it was depoſited for that purpoſe by the correſpondent. But the broker has no *ſub-lien* on the policy for the general balance of his own account with ſuch correſpondent, if he knew at the time that the policy was effected for another perſon.

So, where a principal gives notice to his factor (*e*) of an intended conſignment of a ſhip to him for the purpoſe of ſale, and in conſequence draws bills on him, which the factor accepts; and afterwards the principal dies; but his executors direct the captain

(*d*) Man *v.* Shiffner, 2 *Eaſt Rep.* 523.
(*e*) Hammonds *v.* Barclay, 2 *Eaſt Rep.* 227.

of

of the ſhip to follow his former orders; who thereupon delivers the ſhip into the poſſeſſion of the factor, who ſells the ſame; it was held, that the factor has a lien upon the proceeds as well for the amount of money diſburſed by him for the neceſſary uſe of the ſhip on its arrival, and for the acceptances by him actually paid, as for the amount of his outſtanding acceptances not then due.

4thly. *In what Caſes a Factor or Agent is not entitled to recover for Commiſſion, or Money paid, &c.*

In the caſe of *Hereford* v. *Powell*, (*f*) it was ruled by *Holt*, Ch. J. "That where a factor abroad deſerves money for factorage, he cannot bring an action for his factorage, unleſs the principal refuſe to come to account; and if it appears that the factor hath money in his hands, he may detain, and cannot bring an action for his factorage: but if he were directed to veſt all the produce of the adventure in wines, or other goods, then he might bring an action for his factorage, becauſe he cannot detain, and hath no other remedy.

So, a factor or agent ſhall not have any ſalary allowed him where he acts againſt the intereſt of his principal. (*g*)

So, a broker who contracts with others for the ſale of ſtock at a future day by the authority of his principal, who afterwards refuſes to make good the bargain, cannot, by paying the difference to ſuch third perſons, maintain an action on an implied *aſſumpſit* againſt his principal for the amount; ſuch payment being conſidered voluntary for which no action can be maintained. (*h*)

(*f*) *Holt's Rep.* 467.
(*g*) Maxwell *v.* Sharp, *H. M. S. S. See alſo* 8 *Bro. P. C.* 339. 8*vo ed.*
(*h*) *Vide* Child *v.* Morley, 8 *Term Rep.* 610.

CHAPTER

CHAPTER V.

Of Contracts by Agents of Government, &c.

AN officer appointed by government, treating as an agent for the public, is not liable to be ſued upon a contract made by him in that capacity, unleſs he make an abſolute and unqualified undertaking to be *perſonally* reſponſible.

Thus, in the caſe of *Macbeath* v. *Haldimand*, (*a*) which was an action upon promiſes againſt the defendant, as agent, for work and labour. The cauſe was tried before *Buller*, Juſt. and at the trial a verdict was found for the defendant, by the direction of the learned Judge, under the following circumſtances, which were reported to the Court of *King's Bench*, upon a motion for a new trial.

In the year 1779, the defendant being governor of *Quebec*, appointed Captain *Sinclair* to the command of a fort called *Michilimakinac*, ſituated upon the lake *Huron*, in the province of *Canada*. On the 17th *Auguſt* 1779, the defendant tranſmitted certain inſtructions to *Sinclair* reſpecting the government of the fort, in which he ſaid, "You are to pay great attention to the *Indians* "reſorting to *Michilimakinac*, or furniſhed with neceſſaries from "thence. Endeavour to preſerve them in good humour; and "attach them by every means in your power to the king's intereſt.

In a further part of the ſame inſtructions, he added,

"You will draw bills of exchange for defraying the contin-"gencies incident to that poſt, in the manner practiſed by Ma-"jor *De Peyſter*, (an officer on whom that command had been be-"fore conferred,) taking care to moderate and reduce thoſe ex-"pences, as far as can be done without injuring the king's ſer-"vice."

(*a*) 1 *Term Rep.* 172. *Note, the rule of law which is laid down in this caſe applies equally whether the contract be by* parol *or by* deed. *Vide* Unwin *v.* Wolſeley, *ib.* 674.

For

For ſome time *Sinclair* employed one *Grant* to diſtribute preſents among the *Indians*, and to procure military ſtores, &c. for the uſe of the garriſon; and, to defray theſe and other expences, drew bills of exchange upon the governor, according to his inſtructions. When theſe accounts came to the defendant he made objections to ſeveral of the articles as unneceſſary and exhorbitant; and ſoon after recommended the plaintiff to *Sinclair* by a letter dated the 16th of *May* 1782, of which the following is an extract:

"Upon an examination of the accounts accompanying your "late drafts, for expences incurred at *Michilimakinac*, the arti- "cles are, in general, charged at prices exceeding all bounds of "moderation."

"Upon compariſon of the prices made here, the advantage "taken of the neceſſities of the Crown by the traders at *Michili-* "*makinac*, is ſhamefully obvious; and it is more ſo in the ac- "count of Mr. *Grant*, who appears to be an agent for govern- "ment, than in any other particular.

"Perſuaded that you have ſupplied your wants from thoſe "traders in whom you have had the greateſt reaſon to confide, "I find there is but little to be expected from any of them re- "ſiding at that poſt; which induced me to make enquiry if any "perſon could be found here more worthy of the public confi- "dence. A Mr. *Macbeath*, who will deliver this letter, and who "has juſt made application for a paſs, was mentioned to me as "a man of known and eſtabliſhed integrity; and, upon a more "particular enquiry, I find that he has always, both here and in "the upper country, merited that character. I have propoſed "to him to ſupply the Crown with ſuch quantities of *Indian* corn "and greaſe as may be wanted for the neceſſary purpoſes at that "poſt; and likewiſe all other articles which ſhall occaſion ly "be wanted in the engineer department, which he has under- "taken to do for 10*l. per cent.* on the market prices at the place, "(coſts and charges); a profit which appears to be reaſonable, "inaſmuch as it is greatly under that hitherto charged."

(After ſome orders given relative to the plaintiff,)

"Theſe inſtructions, and all others that concern the intereſt "of the Crown, I am perſuaded that you will chearfully give him."

A letter from the defendant to the plaintiff, dated *May* 17th, 1782:

" Having thought it fit to direct Lieutenant Governor *Sinclair*, " commanding the poſt of *Michilmakinac*, to employ you in ſup- " plying ſuch quantities of corn and greaſe, and all other articles, " as ſhall be wanted for the uſe of the Crown at that poſt, in con- " ſequence of your offer to furniſh the ſame at the rate of 10*l.* " *per cent.* on the coſts and charges here and to *Michilmakinac*, for " all articles, (corn and greaſe excepted), and theſe at the ſame " rate where they ſhall be purchaſed, for which ſufficient vouchers " are to accompany your accounts. You are therefore hereby " directed to make applications, from time to time, to Lieutenant " Governor *Sinclair* for ſuch directions, information, and aſ- " ſiſtance, as will beſt enable you to execute that buſineſs to " the greateſt advantage for the public intereſt, as your continuing " in this employ will entirely depend upon your conduct there- " in."

Several ſpecial orders were proved from *Sinclair* to the plaintiff, for ſupplying particular articles, amongſt which was the follow- ing, dated 1ſt of *Auguſt* 1782:

" You will be pleaſed for the future, without any requiſitions " in form, to provide for the different ſervices of the poſt, in the " manner leaſt expenſive to government, and ſtill equal to the ne- " ceſſities of the different departments."

In purſuance of theſe orders, the plaintiff furniſhed articles to a conſiderable amount. But when his bills, at the top of which was prefixed " Government debtor to *George Macbeath*, for ſun- " dries paid by order of Lieutenant Governor *Sinclair*," were ſent to the defendant at *Quebec*, he made objections to ſeveral of the articles, as being unreaſonable, and furniſhed contrary to ſub- ſequent inſtructions.

Afterwards, on the 2d of *July* 1784, *Mathews* (the defendant's ſecretary,) wrote the following letter to Meſſrs. *Dobie and Forſyth*, who were agents for the bill-holders:

" I am commanded by his Excellency General *Haldimand*, to " acquaint you, that, in conſequence of inſtructions from the " Lord's Commiſſioners of his Majeſty's Treaſury, in anſwer to " a repreſentation made by him to their Lordſhips, concerning the " bills drawn upon him by Lieutenant Governor *Sinclair*, in the " year 1782, which he thought it neceſſary to refuſe payment " of, his Excellency in conformity with the offer which he made

" to the holders of the ſaid bills in the year 1782, is ſtill willing to " pay ſuch parts of the charges, for which the ſaid bills were " drawn, as at that time appeared upon examination to be rea- " ſonable."

(After ſtating the amount of goods furniſhed for the engineer department to the value of 9266*l.* 5*s.* 1½*d*, which the Governor was willing to pay, the letter proceeded thus :)

" His Excellency will alſo pay for all the goods or utenſils " furniſhed for the engineer department, ſo far as they ſhall ap- " pear to be charged at reaſonable prices, to be aſcertained by " merchants appointed for that purpoſe by his Excellency and " the holders of the bills. And he will further pay for the la- " bour, ſo far as the accounts thereof ſhall appear to be pro- " perly vouched. But with regard to the charges for the hire " of horſes and carts, his Excellency, from the exorbitance of the " charge, will have nothing to do therewith, leaving neverthe- " leſs to the complainants to take ſuch methods to procure re- " dreſs therein, as they ſhall think proper.

" With reſpect to the *Indian* department, his Excellency will " pay ſuch part of the articles as compoſe the accounts, for which " the bills were drawn, as were not purchaſed contrary to his " orders to Lieutenant Governor *Sinclair*, dated 22d of *Auguſt* " 1781, and except alſo for the articles furniſhed by Lieutenant " Governor *Sinclair* himſelf; which his Excellency will not pay, " as they were received from the *Indians*, in expectation of being " well repaid by the preſents which they afterwards received " from the king's ſtores."

(The letter then ſtated the account of *Indian* expences, amount- ing to 12,715*l.* 9*s.* 10*d.*, and concluded by ſaying,)

" You will therefore ſee by the foregoing ſtate, that the ſum " propoſed by his Excellency General *Haldimand*, to be imme- " diately paid, amounts to 21,981*l.* 14*s.* 11½*d.*, *New-York* cur- " rency."

The bills which *Sinclair* drew in favour of the plaintiff were drawn on the defendant *as Governor and Commander in Chief.*

The plaintiff finding that all theſe bills drawn by *Sinclair*, and indorſed by himſelf, which were to a much greater amount than the above-mentioned ſum, would not be accepted by the defend- ant, received a partial payment from him, with a proviſo, that it

ſhould not prejudice his claim for the remainder, to recover which was the object of the preſent action. The plaintiff remained in his poſt till 1785.

It was acknowledged, at the trial and in court, that all the accounts had been ſubmitted to a board of officers by the defendant, for them to examine and report what charges ought to be allowed, and that the ſum adjudged by them to be due, which fell very ſhort of the plaintiff's demand, had been paid by the treaſury.

Buller, J. after reporting the above facts, ſaid that he had been of opinion at the trial that the goods in queſtion having been ſupplied for the uſe of government, and the defendant not having perſonally undertaken to pay, the plaintiff ought to be nonſuited: that it appeared to him that the plaintiff had acted with the defendant ſolely in the character of Commander in Chief, conſidering him as the agent of government: that all the letters imported it to be a tranſaction on the part of government; and that the accounts confirmed it. But the plaintiff's counſel appearing for their client when he was called, he left the queſtion to the jury, telling them that they were bound to find for the defendant in point of law. And upon their aſking him whether, in the event of the defendant's not being liable, any other perſon was, he told them that was no part of their conſideration; but, being willing to give them any information, he added, that he was of opinion that if the plaintiff's demand were juſt, his proper remedy was by a petition of right to the Crown. On which they found a verdict for the defendant.

The rule for granting a new trial was moved for on the ground of miſdirection of the Judge upon two points.

1ſt. That the defendant had, by his own conduct, made himſelf perſonally liable, which queſtion ſhould have been left to the jury.

2dly, That the plaintiff had no remedy againſt the Crown by a petition of right, on the ſuppoſition of which the jury had been induced to give their verdict.

Lord *Mansfield*, Ch. J. declared that the Court did not feel it neceſſary for them to give any opinion on the ſecond ground. His Lordſhip ſaid, "that great difference had ariſen ſince the revolution

volution with reſpect to the expenditure of the public money. Before that period, all the public ſupplies were given to the king, who, in his individual capacity contracted for all expences. He alone had the diſpoſition of the public money; but ſince that time, the ſupplies have been appropriated by parliament to particular purpoſes, and now whoever advances money for the public ſervice truſts to the faith of parliament.

That according to the tenor of Lord *Somers*'s argument in the banker's caſe, though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the banker's caſe; and parliament was afterwards obliged to provide a particular fund towards the payment of thoſe debts. Whether, however, this alteration in the mode of diſtributing the ſupplies had made any difference in the law upon this ſubject, it was unneceſſary to determine; at any rate, if there were a recovery againſt the Crown, application muſt be made to parliament, and it would come under the head of ſupplies for the year.

In ſhowing cauſe againſt the rule, the counſel for the defendant allowed that a perſon, acting in a public ſituation under government, might, by his own conduct, make himſelf perſonally liable for contracts, for which, from the nature of his office, he would not otherwiſe be anſwerable. But the plaintiff ſhould make out a very ſtrong caſe, in order to induce the Court to believe that ſuch was the agreement. As if a perſon, reſiding at a diſtance abroad, abſolutely refuſed to treat with the government, but choſe rather to rely upon the perſonal ſecurity of the governor, who was upon the ſpot, and who was willing to treat upon thoſe conditions. But they contended in this caſe that the defendant had acted avowedly as the agent of government, and did not intend to make himſelf perſonally reſponſible.

In ſupport of the rule, it was contended that the evidence which was produced at the trial was ſuch as ought to have been left to the jury to determine whether the defendant had not made himſelf *perſonally* liable.

In general, a commanding officer is not anſwerable for ſtores and other articles furniſhed notoriouſly for the uſe of government, but there is no doubt that he may become ſo by his own conduct. Here the plaintiff was directed by the defendant to obey the orders of Lieutenant Governor *Sinclair*. Every article which he furniſhed was in obedience to *Sinclair*'s commands; and *Sinclair* himſelf was inſtructed to draw bills for the payment of thoſe articles,

ticles, not on the government, or on any official paymaſter, which would have afforded a ſtrong preſumption in diſcharge of the defendant's liability, but his orders were to draw on the defendant himſelf.

The whole queſtion therefore ſhould have been left to the jury, whoſe conduct proved that they entertained doubts upon it, till they were informed that the plaintiff had his remedy againſt the Crown.

But if there be no remedy in the form of a petition of right againſt the Crown, on account of the appropriation of the ſupplies ſince the revolution, and the public is to be conſidered as the real debtor, then there was no other perſon againſt whom this demand could ſo properly be urged as againſt the defendant, who repreſented and acted as oſtenſible agent for the public in this tranſaction.

The Court, however, determined that the defendant having contracted with the plaintiff merely as the agent of government, was not *perſonally* liable. And Lord *Mansfield*, Ch. J. ſaid, "The only queſtion before the Court is, whether the *defendant* be liable or not in this action? if he be, the plaintiff muſt recover; if not, no conſideration reſpecting the plaintiff's remedy againſt any other party can induce the Court to make him ſo.

There is no colour to ſay that he is liable in his character of Commander in Chief.

In a late caſe which was tried before me, where one *Savage* brought an action againſt Lord *North*, as Firſt Lord of the Treaſury, in order that he might be reimburſed the expences which he had incurred in raiſing a regiment for the ſervice of Government, I held that the action did not lie.

So in another caſe of *Lutterloh* againſt *Halſey*, which was an action brought againſt the defendant, who was a commiſſary, for the ſupply of forage for the army, and by whom the plaintiff had been employed in that ſervice, the commiſſary was held not liable.

In the preſent caſe it was notorious that the defendant did not *perſonally* contract; the plaintiff knew at the time that he furniſhed the ſtores, that they were for the uſe of government; and he afterwards made government debtor in his bills.

But it has been urged that the defendant made himſelf liable after the debt was contracted. In my opinion there is no ground for ſuch an argument: the evidence does not warrant it,

Then

Then it was objected, that whether the defendant had made himſelf liable or not, was a queſtion which ought to have been left to the jury to decide. But there was no evidence which was proper for their conſideration; for the evidence conſiſting altogether of written documents and letters, which were not denied, the import of them was matter of law and not of fact."

Aſhhurſt, J. ſaid "In great queſtions of policy we cannot argue from the nature of private agreements. But even in theſe caſes the queſtion muſt be, what was the meaning of the parties at the time of entering into the contract?

A perſon acting in the capacity of an agent, may undoubtedly contract in ſuch a manner as to make himſelf *perſonally* liable; and that brings it to the true queſtion here, namely, whether, from any thing that paſſed between the parties at the time, it was underſtood by them that the plaintiff was to rely upon the perſonal ſecurity of the defendant? But nothing appears from the evidence in this caſe to warrant ſuch a concluſion. Government was made debtor; and it is evident that the plaintiff looked to them for payment: for he firſt made application to the treaſury, and his demand againſt the defendant was only an after thought, when he found he could not obtain the money in any other way. Then it ſeems to me that there is nothing in this tranſaction to fix the defendant, or to ſhow that the plaintiff conſidered him as his debtor at the time that the credit was given.

Great inconveniencies would reſult from conſidering a governor or commander as *perſonally* reſponſible in ſuch caſes as the preſent. For no man would accept of any office of truſt under government upon ſuch conditions. And indeed it has frequently been determined that no individual is anſwerable for any engagements which he enters into on their behalf.

There is no doubt but the Crown will do ample juſtice to the plaintiff's demands, if they be well founded."

So, a captain of a troop is not *perſonally* liable for meat or forage ſupplied for his troop during his abſence on duty, though ordered by his clerk, unleſs he actually receives the ſubſiſtence money from Government, or makes an abſolute promiſe to be anſwerable *perſonally*.

Thus, in the caſe of *Myrtle* v. *Beaver*, (*b*) which was an action of *aſſumpſit* for goods ſold and delivered. The defendant was major

(*b*) 1 *Eaſt Rep.* 135.

and captain of a troop in the *Hants* regiment of fencible cavalry. The defendant was a butcher of *Brighton*, where the troop was quartered. The action was brought to recover the value of meat furnished for the use of the troop between the 25th of *January* and the 22d of *February* 1800. Previous to the first mentioned period, the defendant had the command of his own troop, at *Brighton*, and had employed a serjeant in the troop, of the name of *Bedford*, to act as his clerk in providing for the subsistence of the troop, which it is the duty of the captain to do: and, under the defendant's orders, *Bedford* had from time to time given orders for and superintended the delivery of the meat; and while the defendant remained with the troop, he had himself regularly paid the plaintiff his bill monthly; and the account was admitted to be settled up to the 24th of *January*. At that period the defendant was detached with a small party to command at *Arundel*, about 20 miles off, the greatest part of the regiment remaining at *Brighton*, under the command of the colonel. On the defendant's departure, the actual command of his troop devolved upon Mr. *Hunt*, the first lieutenant, though they were still subject to the defendant's military orders, and all military reports and returns of the troop were made first to him, and from him to head quarters. After the defendant's departure from *Brighton*, serjeant *Bedford* received his orders from Lieutenant *Hunt* for the subsistence of the men, and received money from him for such purposes, and was employed by him, as he had before been by the defendant when he was present, to give orders for and superintend the delivery of the meat, which he did in the same manner as before; but it did not appear that such change of his authority was made known to the plaintiff, who continued to supply meat as before. On the 20th of *February*, and before the usual time for settling the plaintiff's bill, Lieutenant *Hunt*, who, besides his command in the troop, was also paymaster of the regiment, absconded, without settling any of his regimental accounts, and leaving this demand, among others, unsatisfied. It appeared to be the course of the service, that a certain allowance is made by Government to the captain of every troop for the subsistence of the men, upon which he derives an allowed profit to himself, and to which he was still entitled during his absence on the detached command at *Arundel*. This subsistence money is issued every month from the agent of the regiment to the paymaster in advance, by whom it is paid over to the captains of troops, who draw upon the paymaster for it, at their pleasure. The agent of the regiment regulates the amount

of the monthly iſſue to the paymaſter by the muſter-rolls, and the bills which have before been ſent in, and theſe are ſigned by the captain of the troop, while he is in the actual command; but during the period in queſtion, in which the plaintiff's bill accrued, returns of this nature were ſigned by *Hunt*, and ſent in to the pay-office: and this allowance was, in the courſe of the ſervice, received by *Hunt*, but was not in fact paid over by him to the defendant during the period that he was in the actual command of the troop. The paymaſter is recommended by the colonel of the regiment, and approved by the king, to whom he gives a bond to perform the duties of his office, and account faithfully, and to repay the ſurplus, if any, in his hands. For ſome days, at the latter end of *January* and beginning of *February*, the colonel was abſent from the regiment, and during that time the principal command devolved upon the defendant, as major and next in ſeniority, who came over to and reſided at *Brighton*, but *Hunt* ſtill continued to have the actual command of the defendant's troop.

The Court ſaid, "It is an undiſputed fact that the defendant was not in the actual command of his troop during any period of the time when this demand accrued; but the command had devolved upon another officer, who was next in ſeniority. The defendant neither gave the orders for the proviſions, nor had he any authority to do ſo. It is true that the ſerjeant acted at firſt by the defendant's orders; but he is not to be conſidered as the agent of a private individual; it was plain that he acted as agent for whatever officer happened to have the command of the troop. The defendant has never received any money from Government for this purpoſe; but the money was received by *Hunt*, who was next in command, as well as paymaſter, and by whom it ought to have been paid over. So that on the whole there appears to be no ground for fixing the defendant with a liability in this caſe."

So, the captainof a troop for which forage was furniſhed by the orders of a clerk appointed by ſuch captain, is not liable in an action for money had and received for ſuch forage, though preſent with the troop at the time; it not appearing that he had received any money for this purpoſe from the paymaſter, to whom it is iſſued by Government, and upon whom the captain is entitled to

draw

draw for a certain ſum, regulated by the returns of the preceding month.

Thus, in the caſe of *Rice* v. *Chute*, (*e*) which was a ſimilar action to the laſt; and the plaintiff's demand was for forage ſupplied by him at different times to the *Hampſhire* ſencible cavalry, at *Brighton*, from the 15th of *October* 1799 to *May* 1800; and the only queſtion was, whether the defendant were liable for it? *Reed*, the quarter-maſter of the troop ſaid, that he was appointed by the defendant to be clerk of the troop, at the ſalary of 10*l.* a year. He proved the amount of the oats delivered by the plaintiff to the uſe of the troop, and that the oats were delivered according to the orders of the defendant, as commanding officer of the troop, the ſame having been purchaſed by the witneſs by the expreſs direction of the defendant; that *Hunt* was the paymaſter of the troop for the laſt two years and a half; and that he, the witneſs, had paid the plaintiff ſeveral ſums, by bills on the paymaſter. The plaintiff received orders to draw bills on *Hunt*, and was paid at different times by him. The plaintiff and others who ſupplied the troop were to be paid monthly, but *Hunt* had not paid at all ſince *October* 1799. The drafts were of this form: "27th of "*January* 1800. Two months after date pay *John Rice*, or "order, 316*l.* value in oats by *Alexander Reed*;" addreſſed to *W. Hunt*, Eſq. and accepted by him. In the latter end of *October* 1799 the defendant was recruiting at *Baſingſtoke*, and came to *Brighton* on the 8th of *November* following. The defendant was in *Brighton* for three or four weeks, and was detached to *Arundel* in the *December* of the ſame year. About the 24th *January* the defendant returned, and ſtaid at *Brighton* till his regiment was diſbanded. *Hunt* was appointed paymaſter in 1797, by the Commander in Chief. He had been ſlack in his payments for ſome time, and at laſt abſconded; which was the occaſion of the preſent ſuit. The witneſs had received orders from the defendant to draw bills on the paymaſter, and on his agent too, which were paid. Evidence was alſo given of bills drawn by the defendant on the paymaſter, in favour of various perſons who had furniſhed articles for the troop. At *Brighton* the clerk drew bills as uſual for defendant, and received money for a long time after the new regulation (in *July* 1797, as to the appointment of the paymaſters) both from defendant and from the paymaſter. The clerk ap-

(*e*) 1 *Eaſt Rep.* 579.

plied

plied twice by letter to the defendant, at *Arundel* and *Brighton*, for money for the use of the troop. He also proved that *Hunt*, the paymaster, was indebted to the defendant in 400 *l.*; and the regiment was indebted to *Hunt* in 700*l.*; that *Hunt*'s credit was so bad that no person would have trusted him for 20*l.* Before the new regulation, the colonel appointed the paymaster, and the officers were liable for his deficiencies. By the new regulations the Commander in Chief appoints the paymaster, and the field officers and captains are no longer responsible. However, the same practice continued after as existed before this regulation, namely, that the captains of each troop drew on the paymaster bills for the pay, forage, and quarters of the troop. The two sureties for the paymaster, *Hunt*, were Colonel *Dacre* and Colonel *Everitt*. For the defendant it was proved, that on the 8th *October*, the defendant was recruiting at *Basingstoke*, and remained there till the 3d of *November* following. He was at *Brighton* on the 10th of *November*, and on the 24th of the same month; that from 1st of *December* to the 19th of *January* he was with a detachment at *Arundel*. He was there likewise on the 28th of *January*, and staid till 2d of *February*, and then had leave of absence. He was at *Brighton* on the 1st of *March*; that on the 20th of *February* *Hunt* absconded; that the lieutenant next in command, in the absence of the captain of the troop, signs the accounts and payments, and the pay-list containing the extra food to the horses. On that return the paymaster issues the money. The pay-list is the voucher of the last issue. There was a committee of paymasters, whereof the defendant was one, after the absconding of *Hunt*, who regulated the accounts.

The counsel for the plaintiff, admitting that there was no express undertaking for the payment, contended that he was entitled to recover on the count for money had and received; relying on the state of the paymaster's accounts, as proved by *Reed*. The learned Judge, however, directed the jury to find a verdict for the defendant, but they found a verdict for the plaintiff to the extent of his demand.

But the Court of King's Bench afterwards set aside this verdict, and granted a new trial. And Lord *Kenyon*, Ch. J. said, "I cannot conceive how the captain of a troop can be *personally* responsible for the forage furnished to the troop, whether he have received any money for that purpose or not. It is admitted the goods were not furnished upon his express undertaking. They were ordered by the clerk, who receives his orders from whatever

officer

officer happens to be in command at the time. But it is notorious to all parties that he does not contract as an individual, but on the behalf of Government: and Government, it appears, provides money for this very purpose, which is issued from time to time to the paymaster of the regiment. The parties who furnish the goods know that the money is not to come out of the pocket of the captain of the troop. Then the paymaster not having paid this money over to the defendant, how can we say that the money has been had and received by him to the plaintiff's use, when no money whatever has been received by the defendant. The consequence is, there must be a new trial."

But the reporter observes, that there was another case of *Rice* v. *Everitt*, (*d*) determined at the same time, which was an action brought by the same plaintiff against the colonel of the same regiment, for forage furnished to his own particular troop. The evidence was in general the same as in the other case: but here it appeared that though the defendant had not drawn upon the paymaster of the regiment for the particular sum in demand, and so he could not be said to have received that sum to the plaintiff's use, yet the defendant being indebted to the paymaster on the balance of his own private account with him to the amount of two-thirds of the plaintiff's demand, and being also surety for the paymaster to Government, and the paymaster having absconded in a state of insolvency, the Court refused to set aside a verdict recovered by the plaintiff for the amount of his debt, as the defendant was liable, in some shape or other, for the paymaster's default, and justice had upon the whole been done by the verdict.

(*d*) 1 *East Rep.* 583. *n.*

CHAPTER VI.

Of Contracts by Partners.

PARTNERSHIP is thus defined; *contractus societatis eſt, quo duo pluresve inter ſe pecuniam, res, aut operas conferunt, eo fine, ut quod inde redit lucri inter ſingulos pro ratâ dividatur.* (*a*)

This definition of a partnerſhip is ſaid (*b*) to be good as between the parties themſelves, but not with reſpect to the world at large; for in this view of a partnerſhip, the queſtion is generally, not between the parties whether money, goods, or labour were contributed, and in what proportion, but ſimply whether there be an agreement for *a participation of profits?* And upon this queſtion it is obſerved, (*c*) that every man who has a ſhare of the profits of a trade, ought alſo to bear his ſhare of the loſs; and if any one takes part of the profits, he takes a part of that fund, on which the creditor of the trader relies for his payment. It is intended to conſider the ſubject of this chapter in the following order:

1. *What Agreement or Stipulation will conſtitute a Partnerſhip, and thereby render all the Perſons jointly intereſted therein liable to third Perſons.*

2. *What Contracts, &c. made by one Partner ſhall bind himſelf and his Co-partner.*

3. *Of Contracts with a Partnerſhip Firm after a Change or Diſſolution; and of the Notice thereof neceſſary to be given.*

4. *How Partners muſt ſue and be ſued.*

5. *Of the Remedy by* Partners *upon Contracts, &c.* Inter ſe.

(*a*) *Puffendorf, lib.* 5. *cap.* 8. (*b*) *Per* Eyre, *Ch. J. in Wang. v. Carver,* 2 *H. Bl.* 246. (*c*) *Per* De Grey, *Ch. J.* 2 *Bl. Rep.* 1000.

1. *What*

1. *What Agreement or Stipulation will conſtitute a Partnerſhip, and thereby render all the Perſons jointly intereſted therein liable to third Perſons.*

In order to conſtitute a partnerſhip, ſo as to make a perſon liable as a partner, there muſt be ſome agreement between him and the oſtenſible perſon to ſhare in the profits of a trade, or he muſt have permitted that other to uſe his credit, and to hold him out as one jointly anſwerable with himſelf.

Thus, in the caſe of *Waugh* v. *Carver* and others, (*d*) which was an action of *aſſumpſit* for goods ſold and delivered, and for work and labour done, &c. A verdict was found for plaintiff, ſubject to the opinion of the court, on a caſe which ſtated, That on the 24th *February* 1790 articles of agreement were duly executed between *Eraſmus Carver* and *William Carver* (two of the defendants) of the one part, and *Archibald Gieſler* (the other defendant) of the other part, reciting, "Whereas the ſaid *Archibald Gieſler*, ſome "time ſince, received appointments from ſeveral of the principal "ſhip-owners, merchants and inſurers in *Holland*, and other places, "to act as their agent in the ſeveral counties of *Hampſhire*, *Devon-*"*ſhire*, *Dorſetſhire*, and *Cornwall*; and whereas the ſaid *Eraſmus* "*Carver* and *William Carver* have, for a great number of years, "been eſtabliſhed at *Goſport* in the agency line, under the firm of "*Eraſmus Carver* and *Son*, and hold ſundry appointments as con-"ſuls and agents for the *Daniſh* and other foreign nations, and "alſo have very extenſive connexions in *Holland*, and other parts "of *Europe*; and whereas it is deemed for their mutual intereſt, "and the advantage of their friends, that the ſaid *Archibald Gieſler* "ſhould remove from *Plymouth*, and eſtabliſh himſelf at *Cowes* in "the *Iſle of Wight*; and the ſaid *Eraſmus Carver* and *William* "*Carver* and the ſaid *Archibald Gieſler* have agreed, *that each ſhould* "*allow to the other certain portions of each others commiſſions and pro-*"*fits*, in manner hereafter more particularly mentioned and ex-"preſſed; *now therefore this agreement witneſſeth*, and the ſaid "*Archibald Gieſler* doth hereby for himſelf, his executors and

(*d*) 2 *H. Bl.* 235.

"adminiſtrators,

" adminiſtrators, covenant promiſe and agree, to and with the ſaid " *Eraſmus Carver* and *William Carver*, their executors and aſſigns " in manner following, (that is to ſay), that the ſaid *Archibald* " *Gieſler* ſhall and will, when required ſo to do, by the ſaid *Eraſ-* " *mus Carver* and *William Carver*, remove from *Plymouth*, and " eſtabliſh himſelf at *Cowes* aforeſaid, for the purpoſe of carry- " ing on a houſe there in the agency line, on his account; but in " conſequence of the aſſiſtance and recommendations which the " ſaid *Eraſmus Carver* and *William Carver* have agreed to render " in ſupport of the ſaid houſe at *Cowes*, the ſaid *Archibald Gieſler* " doth covenant promiſe and agree to and with the ſaid *Eraſmus* " *Carver* and *William Carver*, that the ſaid *Archibald Gieſler*, his " executors, adminiſtrators, and aſſigns, ſhall and will well and " truly pay or allow, or cauſe to be paid or allowed to the ſaid " *Eraſmus Carver* and *William Carver*, their executors, adminiſ- " trators, or aſſigns, *one full moiety or half part of the commiſſion* " *agency*, to be received on all ſuch ſhips or veſſels, as may arrive " or put into the port of *Cowes*, or remain in the road to the " *Weſtward* thereof, within the *Needles*, of which the ſaid *Archi-* " *bald Gieſler* may procure the addreſs, and likewiſe *one full moiety* " *or half part of the diſcount* on the bills of the ſeveral tradeſmen, " employed in the repairs of ſuch ſhips or veſſels. And the ſaid " *Archibald Gieſler* doth alſo covenant, promiſe, and agree, to and " with the ſaid *Eraſmus Carver* and *William Carver*, that they the " ſaid *Eraſmus Carver* and *William Carver*, ſhall be at full liberty " to engage warehouſes at *Cowes* aforeſaid, on ſuch terms and in " ſuch manner, as they may think proper, in which the ſaid *Archi-* " *bald Gieſler* ſhall not upon any grounds or pretence whatſoever, " either directly or indirectly interfere. And the ſaid *Eraſmus* " *Carver* and *William Carver*, for the conſiderations hereinbefore " mentioned, do hereby covenant promiſe and agree, to and with the " ſaid *Archibald Gieſler*, his executors, and adminiſtrators, that they " the ſaid *Eraſmus Carver* and *William Carver ſhall and will well and* " *truly, pay or allow, or cauſe to be paid or allowed, to the ſaid* Archi- " bald Gieſler, *his executors, adminiſtrators, or aſſigns, three-fifth* " *parts or ſhares of the commiſſion or agency to be received by the ſaid* " Eraſmus Carver *and* William, *on account of all ſhips and veſſels,* " *the commanders whereof may in conſequence of the endeavours, inter-* " *ference, or influence of the ſaid* Archibald Gieſler, *proceed from* " Cowes *to* Portſmouth, *and there put themſelves under the direction* " *of the ſaid* Eraſmus Carver *and* William Carver, *in manner herein*

before

" *before mentioned, and likewiſe one and one-half* per cent. *on the* " *amount of the bills of the ſeveral tradeſmen employed in the repairs of* " *ſuch ſhips or veſſels, together with one-fourth part of ſuch ſum or* " *ſums, as may be charged or brought into account for warehouſe rent,* " *on the cargoes of ſuch ſhips or veſſels reſpectively; and alſo one-ſixth* " *part of ſuch ſum or ſums as may be charged or brought into ac-* " *count, for warehouſe-rent on the cargoes of ſhips or veſſels, as may be* " *landed at* Cowes *aforeſaid.* And alſo that they, the ſaid Eraſmus " Carver *and* William Carver, *their executors, adminiſtrators, or* " *aſſigns, ſhall and will, well and truly, pay or allow, or cauſe to be* " *paid and allowed, unto the ſaid* Archibald Gieſler, *his executors,* " *adminiſtrators, or aſſigns, one fourth part or ſhare of the commiſſion* " *or agency to be received by the ſaid* Eraſmus Carver *and* William " Carver, *on account of all ſuch ſhips or veſſels that may arrive or put* " *into the port of* Portſmouth, *or remain in the limits thereof, under* " *the care and direction of the ſaid* Eraſmus Carver *and* William " Carver; *and likewiſe one-half* per cent. *on the amount of the bills of* " *the ſeveral tradeſmen employed in the repairs of ſuch ſhips or* " *veſſels.*

" And it is hereby likewiſe covenanted, declared, and agreed, by " and between the ſaid *Eraſmus Carver* and *William Carver*, and " the ſaid *Archibald Gieſler* that each party ſhall *ſeparately run the* " *riſque of, and ſuſtain all ſuch loſs and loſſes, as may happen on the* " *advance of monies*, in reſpect of any ſhips or veſſels, under the " immediate care of either of the ſaid parties reſpectively; it be- " ing the true intent and meaning of theſe preſents, and of the par- " ties hereunto, that neither of them, the ſaid *Eraſmus Carver* and " *William Carver* and *Archibald Gieſler ſhall at any time or times* " *during the continuance of this agreement, be in anywiſe injured, pre-* " *judiced, or affected, by any loſs or loſſes that may happen to the other of* " *them, or that either of them ſhall in any degree be anſwerable or ac-* " *countable, for the acts, deeds, or receipts, of the other of them, but* " *that each of them, the ſaid* Eraſmus Carver *and* William Carver, " *and* Archibald Gieſler, *ſhall in his own perſon, and with his own* " *goods and effects, reſpectively, be anſwerable and accountable for his* " *own loſſes, acts, deeds, and receipts.*

" Provided always, nevertheleſs, and it is hereby declared and " agreed to be the true intent and meaning of theſe preſents, and " the parties hereunto, that the foregoing articles ſhall not, nor " ſhall be conſtrued to bear reference to *their particular, or ſeparate* " *mercantile concerns or connections.*"

In

In purſuance of theſe articles *Gieſler* removed from *Plymouth*, and ſettled at *Cowes*, where he carried on the buſineſs of a ſhip-agent, in his own name, and contracted for the goods, &c. which were the ſubject of the action. And the queſtion was, whether the defendants were partners on the true conſtruction of the articles?

The caſe was argued twice at the bar: and the Court, after taking time to conſider of their judgment, determined that the defendants were partners; and conſequently jointly liable for the debt in queſtion.

Lord Chief Juſtice *Eyre*, ſaid: "The diſcuſſion of this caſe has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether by conſtruing this to be a partnerſhip, we ſhould not determine, that if there was an annuity granted out of a banking-houſe, to the widow, for inſtance, of a deceaſed partner, it would make her liable to the debts of the houſe, and involve her in a bankruptcy. But I think this caſe will not lead to that conſequence.

The definition of a partnerſhip, cited from *Puffendorf*, is good, as between the parties themſelves, but not with reſpect to the world at large. If the queſtion were between A. and B. whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, ſtock or labour, and on what agreement they were to divide the profits of that contribution. But in all theſe caſes, a very different queſtion ariſes, in which that definition is of little ſervice. The queſtion is generally, not between the parties, as to what ſhares they ſhall divide, but reſpecting creditors, claiming a ſatisfaction out of the funds of a particular houſe, who ſhall be deemed liable in regard to theſe funds? Now a caſe may be ſtated, in which it is the clear ſenſe of the parties to the contract, that they ſhall not be partners; that A. is to contribute neither labour nor money, and, to go ſtill farther, not to receive any profits. But if he will lend his name as a partner, he becomes as againſt all the reſt of the world, a partner, not upon the ground of the real tranſaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to ſuppoſe that they lent their money upon the apparent credit of three or four perſons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone

into, however proper for the diſcuſſion of the queſtion, is irrelevant to a great part of the caſe. Whether theſe perſons were to interfere more or leſs, with their advice and directions, and many ſmall parts of the agreement, I lay entirely out of the caſe; becauſe it is plain upon the conſtruction of the agreement, if it be conſtrued only between the *Carvers* and *Gieſler*, that they were not, nor ever meant to be partners. They meant each houſe to carry on trade without riſque of each other, and to be at their own loſs. Though there was a certain degree of controul at one houſe, it was without an idea that either was to be involved in the conſequences of the failure of the other, and without underſtanding themſelves reſponſible for any circumſtances that might happen to the loſs of either. That was the agreement between themſelves. But the queſtion is, whether they have not by parts of their agreement, conſtituted themſelves partners in reſpect to other perſons. The caſe therefore is reduced to the ſingle point, whether the *Carvers* did not intitle themſelves, and did not mean to take a moiety of the profits of *Gieſler*'s houſe, generally and indefinitely as they ſhould ariſe, at certain times agreed upon for the ſettlement of their accounts. That they have ſo done, is clear upon the face of the agreement: and upon the authority of *Grace* v. *Smith*,(*e*) he who takes a moiety of all the profits indefinitely, ſhall, by operation of law, be made liable to loſſes, if loſſes ariſe, upon the principle that by taking a part of the profits, he takes from the creditors a part of that fund which is the proper ſecurity to them for the payment of their debts. That was the foundation of the deciſion in *Grace* v. *Smith*, and I think it ſtands upon the fair ground of reaſon. I cannot agree that this was a mere agency, in the ſenſe contended for on the part of the defendants, for there was a riſque of profit and loſs: a ſhip-agent employs tradeſmen to furniſh neceſſaries for the ſhip, he contracts with them, and is liable to them, he alſo makes out their bills in ſuch a way as to determine the charge of commiſſion to the ſhip owners. With reſpect to the commiſſion, indeed, he may be conſidered as a mere agent, but as to the agency itſelf, he is as much a trader as any other man, and there is as much riſque of profit and loſs, to the perſon with whom he contracts, in the tranſactions with him, as with any other trader. It is true he will gain nothing but his diſcount, but that is a profit in the trade, and there may be loſſes to him, as well as to the owners. If therefore the principle be true, that he who takes the

(*e*) *Poſt* 291.

general

general profits of a partnerſhip, muſt of neceſſity be made liable to the loſſes, in order that he may ſtand in a juſt ſituation, with regard to the creditors of the houſe, then this is a caſe clear of all difficulty. For though with reſpect to each other, theſe perſons were not to be conſidered as partners, yet they have made themſelves ſuch, with regard to their tranſactions with the reſt of the world. I am therefore of opinion that there ought to be judgment for the plaintiff."

So, in the caſe of *Bloxam* and *Fourdrinier* v. *Pell* and *Brooke*, (*f*) where it appeared there was a partnerſhip for ſeven years between *Brooke* and *Pell*; but at the end of one year agreed to be diſſolved, but no expreſs diſſolution was had. The agreement recited, that *Brooke* being deſirous to have the profits of the trade to himſelf, and *Pell* being deſirous to relinquiſh his right to the trade and profits, it was agreed, that *Brooke* ſhould give *Pell* a bond for 2485*l.* which *Pell* had brought into the trade, with intereſt at five *per cent.* which was accordingly done. And it was farther agreed, that *Brooke* ſhould pay to *Pell* 200*l. per annum* for ſix years, if *Brooke* ſo long lived, as in lieu of the profits of the trade; and *Brooke* covenanted, that *Pell* ſhould have free liberty to inſpect his books. *Brooke* became a bankrupt before any thing was paid to *Pell*. And this action being brought for a debt incurred by *Brooke* in the courſe of trade, Lord *Mansfield* held that *Pell* was a ſecret partner: He ſaid, "This was a device to make more than legal intereſt of money, and if it was not a partnerſhip, it was a crime. And it ſhall not lie in the defendant *Pell*'s mouth to ſay, it is uſury, and not a partnerſhip."

But where a partner (who retires from the concern) lends money to his co-partner, upon an agreement to allow legal intereſt, with an additional annuity for a certain term of years; this is not a continuance of the partnerſhip, even with reſpect to third perſons, provided there has been public notice of the diſſolution.

Thus, in the caſe of *Grace* v. *Smith*, (*g*) which was an action of *aſſumpſit* for goods ſold and delivered. On the trial a verdict was found for the defendant: and upon a motion to ſet aſide this verdict, *De Grey*, Ch. J. reported, that this was an action brought againſt *Smith* alone, as a ſecret partner with one *Robinſon* to whom

(*f*) *Sittings in the* King's Bench, 7 *Mar.* 1775. *coram Lord* Manſfield, *cited in* 2 *Bl. Rep.* 999.

(*g*) 2 *Bl. Rep.* 998.

the goods were delivered, and who became bankrupt in 1770. That on the 30th of *March*, 1767, *Smith* and *Robinson* entered into partnership for seven years, but in the *November* afterwards some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled; but the dissolution was open and notorious, and was notified to the public on the 17th of *November*, 1767. The terms of the dissolution were, that all the stock in trade, and debts due to the partnership should be carried to the account of *Robinson* only. That *Smith* was to have back 5200*l.*, which he brought into the trade, and 1000*l.* for the profits then accrued, since the commencement of the partnership: That *Smith* was to lend *Robinson* 4000*l.*, part of this 5200*l.*, or let it remain in his hands for seven years, at five *per cent.* interest, and an annuity of 300*l.*, *per annum*, for the same seven years: For all which *Robinson* gave bond to *Smith*. In *June* 1768, *Robinson* advanced to *Smith* 600*l.* for two years' payment of the annuity and other sums by way of interest, and gratuities, and other large sums at different times, to enable him to pay the partnership debts, *Smith* having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of *Robinson*. That on the 1st of *August*, 1768, the demands of *Smith* were all liquidated and consolidated into one, *viz.* 5200*l.*, due to him on the dissolution of the partnership, 1500*l.* for the remaining five years of the annuity, and 300*l.* for *Smith*'s share of a ship: in all 7,000*l.* for which *Robinson* gave a bond to *Smith*. That on the 22d of *August*, 1769, an assignment was made of all *Robinson*'s effects to secure the balance then due to *Smith*, which was stated to be 10,000*l.* Soon after the commission was awarded.

The Court of *Common Pleas* held, that these facts did not amount to a partnership. *De Grey*, Ch. J. said: "The only question is, what constitutes a secret partner? every man who has a share of the profits of a trade, ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be *lent de novo*, or *left behind* in trade by one of the partners who retires. And, whether the terms

of

of that loan be kind or harſh, makes alſo no manner of difference. I think the true criterion is, to inquire whether *Smith* agreed to ſhare the profits of the trade with *Robinſon*, or whether he only relied on thoſe profits, as a fund of payment: A diſtinction, not more nice than uſually occurs in queſtions of trade or uſury. The jury have ſaid this is not payable out of the profits; and I think there is no foundation for granting a new trial."

Blackſtone, J. ſaid: "I think the true criterion, when money is advanced to a trader, is to conſider whether the profit or premium is certain and defined, or caſual, indefinite, and depending on the accidents of trade. In the former caſe it is a *loan*, (whether uſurious or not, is not material to the preſent queſtion), in the latter a *partnerſhip*. The hazard of loſs and profit is not equal and reciprocal, if the lender can receive only a limited ſum for the profits of his loan, and yet is made liable to all the loſſes, and all the debts contracted in the trade, to any amount."

So, a partner whoſe name does not appear in the firm, nor is publicly known to be a partner, is only liable for goods furniſhed during the time he is actually a partner, and receiving the emoluments and profits of the buſineſs. (*h*)

But if he has been known publicly to be a partner, and no notice is given of the *diſſolution*, in that caſe he will be liable for debts after he has actually withdrawn himſelf from the concern. (*i*)

So, if a perſon ſuffers his name to be uſed in a buſineſs, and holds himſelf out as a partner, though in point of fact no partnerſhip exiſts, he is liable to a creditor who contracts with the firm.

Thus, in the caſe of *Young* v. *Axtell* and another, (*k*) which was an action to recover 600*l.* and upwards, for coals ſold and delivered by the plaintiff a coal-merchant. An agreement between the defendants was given in evidence, ſtating that the defendant Mrs. *Axtell* had lately carried on the coal-trade, and that the other defendant did the ſame; that Mrs. *Axtell was to bring what cuſtomers ſhe could, into the buſineſs, and that the other was to pay her an annuity, and alſo* 2*s. for every chaldron that ſhould be ſold to single*

(*h*) Evans v. Drummond, 4 *Eſp. Rep.* 89. (*i*) *Vide Poſt*
(*k*) *At* Guildhall *Sittings after Hil.* 24 Geo. III. *cor. Lord* Mansfield, *cited in* 2 *H. Bl.* 242.

perſons who had been her cuſtomers, or were of her recommending. The plaintiff alſo proved, that bills were made out for goods ſold to her cuſtomers, in their joint names; and the queſtion was whether Mrs. *Axtell* was liable for this debt? Lord *Mansfield*, ſaid, "He "ſhould have rather thought on the agreement *only*, that Mrs. *Ax-* "*tell* would be liable, not on account of the annuity, *but the other pay-* "*ment, as that would be increaſed in proportion as ſhe increaſed the buſineſs.* "However, as ſhe has ſuffered her name to be uſed in the buſi- "neſs, and held herſelf out as a partner, ſhe was certainly liable, "though the plaintiff did not, at the time of dealing, know that "ſhe was a partner, or that her name was uſed." And the jury accordingly found a verdict for the plaintiff.

A partnerſhip may exiſt in a particular concern without conſtituting a general partnerſhip, unleſs a repreſentation is made of a *general* partnerſhip.

Thus, in the caſe of *De Berkom* v. *Smith* and *Lewis*, (*l*) which was an action of *aſſumpſit* to recover the value of a quantity of foreign lace againſt the defendants, charging them as partners. It was admitted that *Smith*, one of the defendants, was liable, but the other defendant, *Lewis*, denied that he was a partner. This was the only queſtion in the caſe. The evidence on the part of the plaintiff was, that he was a foreigner living at *Liſle* in *Flanders*; that having been applied to by the defendants for a quantity of lace on credit, that before he would furniſh it, he wrote over to his correſpondent in *London* to inquire concerning their circumſtances and ſituation; that his correſpondent had inquired from a Mr. *Botham*, a merchant in *London*, who informed him that they were in partnerſhip in trade, which information the correſpondent communicated to the plaintiff, who in conſequence thereof gave them the goods on the terms they aſked.

Mr. *Botham*'s clerk was called, and proved, that the only connexion in trade between Mr. *Botham* and the defendants, was in diſcounting bills, which Mr. *Botham* had been in the habit of doing for *Smith*, one of the defendants, but that on diſcounting a bill at one time for *Smith*, he had introduced *Lewis* to him as his partner.

(*l*) 1 *Eſp. Rep.* 29.

Lord

Lord *Kenyon*, Ch. J. upon this evidence, ruled, "That it was not sufficient to charge *Lewis* as a partner." His lordship said, "That persons might be partners in a particular concern or business, but that, notwithstanding if they did not appear to the world as partners, that it should not be sufficient to constitute a general partnership, and make them liable in other cases not connected with such particular business. That the circumstance in evidence of the introduction of *Lewis* to Mr. *Botham* should be taken *secundum subjectam materiam*, that is, as applying to the transaction in which *Smith* was concerned with Mr. *Botham*, the discounting of bills, to which transaction only it should be confined, and that he was therefore of opinion, that without further evidence a general partnership could not be established, in order to charge *Lewis* the other defendant in this action."

However, it afterwards appearing in evidence, that in fact, *Lewis* had represented himself to the plaintiff as partner in trade with *Smith*; his lordship in his charge to the jury added, "That though in point of fact parties are not partners in trade, "yet if one so represents himself, and by that means gets credit for "goods for the other, that both shall be liable." The plaintiff upon this evidence obtained a verdict.

In order, however, to constitute a partnership in a particular purchase there must either be a joint undertaking to pay, or an agreement to share in the profit and loss.

Thus, in the case of *Heare* and others v. *Dawes* and another, (*m*) which was an action for money lent and advanced. The facts of the case appeared to be as follow: The plaintiffs, who were bankers, had advanced a sum of money on certain tea-warrants of the *East India Company* to *Contencin*, a broker, who deposited the tea-warrants with the plaintiffs as a security, and also gave them his note of hand for the sum advanced. He had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea, at the *East India Company*'s sale, of which they, (together with himself,) were to have separate shares, the lots being, in general, too large for any one dealer. The practice at such sales is, for the company to give a warrant or warrants to the broker or purchaser, for the delivery of the quantity of

(*m*) *Doug.* 371.

tea purchaſed, on payment being made. At the time of the ſale 25*l. per cent.* is advanced, and is forfeited unleſs the whole is paid on the *third*, which is the *laſt*, day of payment. If paid ſooner, allowance is made for prompt payment. The warrants are often pledged, and money raiſed upon them; generally conſiderably leſs than the ſuppoſed value of the tea. It happened, however, n this inſtance, between the time of the depoſit of the warrants with the plaintiffs, and the time when the payment was to be made at the *India Houſe*, that the value of the tea ſunk ſo much as to be conſiderably under the amount of the ſum advanced. The broker, in the mean time, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were ſince either dead, or become bankrupts. The ſhares of the defendants were to be two-ſixteenths of the whole lot. The ground of the action was, that all the employers of the broker were to be conſidered as partners, and jointly and ſeverally liable for the whole. The defendants owed nothing upon their own two-ſixteenths. There was not any joint concern in the re-diſpoſal of the tea. The defendant produced ſeveral bankers and brokers, (of whom *Contencin* was one,) who ſaid, they had had frequent tranſactions of this ſort, (it being a very uſual ſpeculation,) and they always underſtood, that the only ſecurity was the pledge, and the perſonal ſecurity of the broker, unleſs where the principals were inquired after, and declared, which was very rarely done. That, as the practice was to advance conſiderably under the ſuppoſed value of the tea, and it was alſo uſual to ſtipulate, that, if the money was not repaid within a certain time, the lender might ſell, the warrant was of itſelf a general and ſufficient ſecurity. *Contencin* ſaid, that tea-warrants were conſidered as caſh, and paſſed by delivery. On the other ſide, *in anſwer to this evidence*, (the plaintiffs having, at firſt, reſted their caſe on the fact, that there were perſons behind the curtain, for whom the broker acted,) two witneſſes were called: One of them, one *Cartony*, a tea-dealer, ſwore, that a broker had once borrowed ſome money *for him* on tea-warrants, from the plaintiffs, and that the value of the tea having fallen under the ſum advanced, and the broker having failed, he had paid the difference, conſidering himſelf as liable. The other was a perſon who had alſo dealt in tea and in loans of this ſort, and he ſwore, that his idea had always been that the perſons behind the curtain were liable; but, upon croſs examination, he ſaid, he never knew any loſs happen, nor any demand actually made, on the broker's employers.

The

The Court of *King's Bench*, upon these facts being stated, were of opinion that they did not constitute a partnership.

Lord *Mansfield* said: "I considered this, at first, as a case of dormant partners. The law with respect to them, is not disputed, *viz.* that they are liable when discovered, because they would otherwise receive usurious interest without any risk; but, towards the end of the cause, the nature of the transaction, and of these loans, was more clearly explained, and I was satisfied with the verdict, and am now confirmed in my opinion. The evidence of *Cartony* is irrelevant, because he said the broker borrowed the money *for him*; and, besides, he did not dispute the demand. Is this a partnership between the buyers? I think it is not; but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement, to share with one another in the profits and loss. The broker undertakes to buy and sell, but makes no advance without the security of the tea-warrants, which are considered as cash, and pass by delivery, like *East India* bonds. These warrants are pawned with the lender, but the broker has no power to pledge the personal security of the principals. He cannot sell the warrants, and borrow more money on such personal security. It makes no difference, whether specific tea, or the warrants, are delivered at the sale. It would be most dangerous if the credit of a person, who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts. *Non hæc in fœdera veni.* The witnesses did not merely speak to opinion, but to matter of fact, and their own dealings. They said, the money was lent to the broker alone. Sometimes, indeed, lenders have required to know the principals; *they* did not trust the broker alone; but all others who do not ask after the principals do. The note is given as a collateral security personally by the holder of the warrant, not in the character of a partner with other persons, nor as a broker for them."

Buller, J. said: "This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share, he did not act or appear as a partner Nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership, a broker would have it in

in his power to make 500 perſons partners, who had never ſeen nor heard of one another, or might, at his pleaſure, convert his principals into partners, or not, without any authority from them, by taking joint or ſeparate warrants."

So, where one perſon agrees to buy a quantity of goods, and to let others have a certain proportion of them, he alone is anſwerable; ſuch a tranſaction being conſidered a mere *ſub-contract*, and not a *partnerſhip*.

Thus, in the caſe of *Coope* and others *v. Eyre* and others, (*n*) which was an action of *aſſumpſit*, brought by the plaintiffs as owners of a *Greenland* ſhip, called the Earl of *Chatham*, againſt the defendants, as partners, on an agreement to purchaſe oil, the cargo of a ſhip. It appeared that on the 24th *Auguſt*, the defendants, *Eyre*, for himſelf and partners, (who were *Atkinſon* and *Walton*, general merchants) *Hatterſley*, for himſelf and *Stephens*, who were oil merchants, and *Pugh*, for himſelf and ſon, who were alſo oil-merchants, agreed to purchaſe jointly as much oil as they could procure, on a proſpect that the price of that commodity would riſe; that *Eyre* ſhould be the oſtenſible buyer, and the others *ſhare in his purchaſe at the ſame price which he might give*. *Hatterſley* and Co. were to have one-fourth, *Pugh* one-fourth, and *Eyre* and Co. the remaining moiety; that they bought large quantities of oil belonging to other ſhips and other traders beſides the plaintiffs, in the name of *Eyre* and Co.; that *Hatterſley* and *Pugh* occaſionally came forwards, and gave directions as to the delivery of the oils, and otherwiſe interfered in the tranſaction, and alſo made many declarations, "that they were all jointly intereſted in the different "purchaſes, and that there was a general concern between "them."

The evidence as to this point was in ſubſtance as follows: *Garforth*, the broker, proved the contract, ſigned by *Eyre*, for himſelf and Co.; general orders from *Eyre* only to purchaſe any quantity of oil which might offer. *Hatterſley* and *Pugh* told him they were to have a *part* of what was purchaſed in the firm of *Eyre* and Co., and that they were *jointly* concerned. They went to receive a cargo ſold by *Thwaites*, at *Blackwall*. *Thwaites*, who had alſo ſold oil to the defendants, proved that *Hatterſley*, ſaid "*It is all the ſame* "*whether Eyre or I buy it*; *it is the ſame concern*;" and that

(*n*) 1 *H. Bl.* 37.

Pugh

Pugh ſaid, "*Hatterſley and I are concerned*;" that they attended to ſee the oil gauged: *Strickland*, who had the care of *Greenland* dock, proved that *Hatterſley* and *Pugh* ſaid, "We have purchaſed "your oil;' that on failure of *Eyre* and Co. *Pugh* ſent an order not to deliver the oil of the ſhip *Britannia*, which had been purchaſed by *Eyre* and Co., and had the cellars locked.

Kilbington ſold oil to *Eyre* and Co. by *Garforth* the broker, delivered to *Hatterſley*, who gave in payment a bill accepted by *Eyre* and Co., and his own note, to indemnify the witneſs in making an indorſement.

Captain *Haſtings* ſold oil to *Eyre* and Co. by the ſame broker, for which *Pugh* ſigned an agreement.

Captain *Dowſon* alſo ſold oil by *Garforth* to *Eyre* and Co., for which *Pugh* gave a receipt; and being aſked, whether the buyers were reſponſible perſons, told the witneſs that he was ſafe, ſaying, "I am concerned, *Hatterſley* is concerned, and there is a houſe "at *Norwich* which can buy us all." *Pugh* afterwards repeated this in the preſence of *Hatterſley*, who acknowledged it to be true.

Phelps proved that he was agent to ſell oil for a Mr. *Yeomans*, and not truſting to *Eyre* only, whom he conſidered as a mere ſpeculator, required the names of the others concerned to be given in, upon which *Garforth* the broker gave in the names of *Hatterſley* and Co.

At the trial, on the part of the defendants, it was inſiſted that the contract for ſale was made between the plaintiffs and *Eyre* and Co. only, and that the agreement which the defendants entered into between themſelves was only a ſub-contract, and did not conſtitute a partnerſhip. Lord *Loughborough*, Ch. J., after declaring his opinion, (that as the defendants did not appear to have been jointly concerned, further than the purchaſe of the oil, they had not ſuch a joint intereſt in the *profits and loſs* as the law made neceſſary to a partnerſhip,) directed a verdict to be found for them, which was accordingly done.

But the plaintiffs' counſel afterwards moved for a rule to ſhow cauſe why a new trial ſhould not be granted. In ſupport of the rule they admitted that a participation of profit and loſs was neceſſary to conſtitute a partnerſhip, and argued that this was a contract of that nature. Whether the agreement be to divide the goods themſelves at a given time, or the produce on the ſale of them, each party runs the ſame riſque, and each has his ſhare of pro-

fits

fits and loſs, either in the increaſed or decreaſed value of the goods, or the increaſed or decreaſed price for which they might actully be ſold.

The defendants *Hatterſley* and *Pugh*, occaſionally permitted their names and credit to be uſed, and holden out as perſons jointly concerned: neither of them could ſay, "*Non hæc in fœdera* "*veni.*" While the ſpeculation promiſed well, and they feared that the whole profit would belong to the aſſignees of *Eyre* and Co., they went to *Greenland Dock*, to ſecure to themſelves their reſpective ſhares of the concern. This was holding themſelves out as jointly concerned in ſome of the contracts: but if they were concerned in ſome, they were ſo in all, as they were all made under the ſame order. It was known that *Eyre* had ſeveral other perſons concerned with him, otherwiſe he could not have gained credit to ſo large an amount; but it was not neceſſary that the vendors ſhould know who the private partners were: they gave credit to them, though not by name. The broker would not have made a bargain which could not be fulfilled; he knew that he was acting for reſponſible perſons. But it ſhall not be in their power, after three months have elapſed, by their own act, to convert a partnerſhip into a mere agreement. In the caſe of *Rich* v. *Coe*, * the owners of a ſhip, let for a term of years to the maſter, who covenanted to repair her at his ſole expence, were held liable for repairs, though the ſhip-builders ſuppoſed the maſter to be the owner, and gave credit only to him. The firm of a houſe may have a different meaning, according to the nature of the trade. *Eyre* and Co., as general merchants, might mean *Eyre*, *Atkinſon*, and *Walton*; but in the oil-trade (which was known to be an extraordinary concern) *Eyre* and Co. meant *Eyre* and the other defendants, becauſe they were all concerned together in the oil contracts. It is objected that this is not a partnerſhip, but only a *ſub-ſale*, or *ſub-contract*. A *ſub-contract* is a ſecondary contract depending upon ſome primary and antecedent one. In the caſe of a purchaſe of goods, it means a *ſubſequent agreement* to take a part of what has been *previouſly bought*; it is like an *under-leaſe* of lands. But a previous agreement to ſhare in an intended purchaſe, is a contract of *partnerſhip*. So, if before a leaſe was granted, the intended leſſee were to agree to let another have a *ſhare in the concern*, that could not be regarded as a ſub contract, the perſon ſharing would in ſuch caſe be deemed a co-leſſee in equity, and would be liable to the rent and covenants; for *qui*

* *Poſt, tit.* Owners and Maſters of Ships.

ſentit

ſentit commodum ſentire debet et onus. It could not be a ſub-ſale to *Hatterſley* and *Pugh*, becauſe each was to have a ſhare on the ſame terms as *Eyre* and Co. purchaſed. But *Eyre* and Co. were merchants, and merchants never buy to ſell again at *prime coſt*. *Hatterſley* and *Pugh* muſt therefore be ſaid to have ſhared originally in theſe bargains, and not to have purchaſed any ſecond part of them. The ſpirit of buying and ſelling is gain; the ſpirit of partnerſhip is mutual participation of gain.

The Court not being unanimous on this caſe, the Judges delivered their opinions *ſeriatim* as follow:

Gould, J. ſaid, "The facts of the preſent caſe are ſhortly theſe: the defendants and *Eyre* and Co. order one *Garforth*, a broker, to buy quantities of oil. The defendants, *Hatterſley* and Co., and *Pugh* and Co., were to have, for their reſpective ſhares, each one fourth. The broker buys divers ſhip loads; and to ſome of the vendors the defendants, during the treaty, declare it to be a common concern between them and *Eyre* and Co., in whoſe name the purchaſes were made.

But with reſpect to the plaintiffs, the purchaſe was made ſingly in the name of *Eyre* and Co., without any notification that the defendants had any concern in it.

Theſe purchaſes were made on ſpeculation, there being a proſpect that oil would riſe in price; but it afterwards fell, and then the defendants contend that they are not liable to make good the difference, *Eyre* and Co. having failed.

Upon theſe facts two queſtions ariſe; 1ſt, Whether the defendants are partners with *Eyre* and Co.? 2d, If not, whether they are to be deemed joint contractors in the purchaſe for *Eyre* and Co., and ſo liable for the whole?

As to the firſt, I think they cannot be conſidered as partners with *Eyre* and Co. in this purchaſe from the plaintiffs: although there may be partnerſhips in many other inſtances beſides what are merely commercial, as in the caſe of farms rented by ſeveral perſons jointly, and of partnerſhips of attornies, and the like, yet I think the true criterion is as ſtated by Mr. J. *Blackſtone* in the caſe of *Grace* and *Smith*,* "whether they are concerned in profit and "loſs?" and the ſame doctrine is in effect held by Chief Juſtice *De Grey* in that caſe.

But in the preſent caſe there was no communication between the buyers as to profit or loſs. Each party was to have a diſtinct

* *Ante* 291.

ſhare

ſhare of the whole, the one to have no interference with the ſhare of the other, but each to manage his ſhare as he judged beſt. The profit or loſs of the one, might be more or leſs than that of the other.

In this light I am of opinion there is no foundation for the Court to adjudge the preſent caſe a partnerſhip; and the jury having found for the defendants, that there is no reaſon to diſturb the verdict.

2d, Whether they can be conſidered as joint purchaſers.

I think it would be attended with great inconvenience in the common dealings between man and man to admit that poſition. The ſtipulation is, that the purchaſe ſhould be made as for *Eyre* and Co., in the total, and each is to have a ſeparate and diſtinct part. A man goes into *Yorkſhire* to buy as many horſes as he can collect, or a limited number, and agrees with a friend that he ſhall have two. It ſurely cannot be contended that this could make the friend a joint contractor, to ſubject him, in failure of the other, to pay for the whole bargain.

So, in a familiar caſe, a man is about to buy a tun of wine, and agrees that a friend ſhall have a hogſhead.

And I think the caſe of *Hoare* and *Dawes* (*o*) is ſtrong on this head: I need not ſtate the caſe, it having been already ſtated ſeveral times.

Lord *Mansfield* holds it merely "an undertaking with the bro-"ker by each for a particular quantity; no undertaking by one "to advance money for the other, nor to ſhare with one another "in profit or loſs. It would be moſt dangerous if the credit of "a perſon who engages for a 40th part, (for inſtance) ſhould be "conſidered as bound for the 39 others."

This doctrine falls in exactly with my ideas. I think caſes of this nature ſhould ſtand on broad lines, not on ſubtilties and refinements, the ſource of litigation and diſputes."

Heath, J. "The queſtion for the determination of the Court is, whether the contract made with the plaintiffs is ſo far binding on the defendants, *Pugh*, *Hatterſley* and *Stephens*, as to make them liable on the failure of *Eyre* and Co.?"

If this contract may be conſidered independently of the other contracts given in evidence, there could be little doubt. *Eyre* and Co. employ *Garforth*, their broker, to buy oil, and it is agreed that the other defendants ſhall have aliquot parts when the commodity is purchaſed.

(*o*) *Ante* 295.

This

This is a ſub-contract. By a ſub-contract I mean a contract ſubordinate to another contract, made or intended to be made, between the contracting parties on one part, or ſome of them and a ſtranger. *Eyre* and Co. are the only purchaſers known to the plaintiffs; entire credit was given to them alone. *Pugh*, *Hatterſley*, and *Stephens* can be liable only in the event of a concealed partnerſhip, on this principle, "that the act of one partner binds all his "co-partners, on account of the communion of profit and loſs." In truth, they were not partners, inaſmuch as they were only intereſted in the purchaſe of the commodity, and not in the ſubſequent diſpoſition of it.

Great reliance has been placed on this being a joint concern, and a joint ſpeculation. It is ſo between the defendants, but the contracts made with the other vendors are different. A contract made between A. and B. cannot be given in evidence to explain a contract made between A. and C. It is *res inter alios acta*. In fact, the defendants have pledged themſelves explicitly with other perſons in a different manner. The contracts made with other merchants are not admiſſible evidence in this cauſe, except to prove a fraud, if the facts had gone that length; namely, that the houſe of *Eyre* and Co., as a failing houſe, was to ſtand forwards, in order to protect the other defendants, who, by ſuch means, might have the benefit of the ſpeculation, if it proved fortunate, without ſuſtaining any loſs in the event of its failing. No ſuch evidence has been adduced; on the contrary, it appears that the objection made by the other vendors to the firm of *Eyre* and Co. was, "*that they were unknown, and new in the trade.*"

If *Pugh*, *Hatterſley*, and *Stephens* had authorized the broker to purchaſe aliquot ſhares for them, this caſe would have reſembled that of *Hoare* v. *Dawes*, the doctrine of which is confirmed by a paſſage in the Digeſt, lib. 17. tit. 2. *pro ſocio*, ſ. 33. "*qui nolunt inter ſe* "*contendere, ſolent per nuntium rem emere in commune, quod, a ſo-*"*cietate longè remotum eſt.*"

No detriment from this deciſion can ariſe to trade, or affect the credit of merchants; for it behoves every contracting party to conſider the reſponſibility of the perſons with whom he contracts, and he has alſo the reſourſe of a dormant partnerſhip, if any ſuch exiſt and can be proved. For theſe reaſons I am of opinion that the rule ought to be diſcharged."

Wilſon, J. "I am ſo unfortunate as to differ in opinion from the reſt of the Court on the preſent queſtion.

The contract was actually made between the plaintiffs and *Eyre* and Co.; but if the other defendants were jointly concerned in it, they ought to be responsible, as much as if they had personally contracted. That they were so concerned, sufficiently appears from the contracts with the other merchants, and their own declarations. These, I think, were proper to be given in evidence, being against themselves, to which evidence the verdict was contrary.

The defendants were all concerned in a general speculation: there was an original agreement between them to purchase as much oil as they could procure. Of what nature that agreement was, there is no evidence precisely to prove, no witness having been present when it was concluded. It might have been such as would have made them jointly answerable, or it might not. How then are we to collect what it was? surely from the declarations of the parties themselves.

Thwaite's evidence proves that *Hatterſley* said, "it is all the "same whether *Eyre* or I buy it; it is the same concern." This shows it was not a sub-contract. If *Hatterſley* had bought the oil himself, he would have been a contractor with *Thwaites*; and when he who knew what the agreement was between the defendants, declares it to be the same thing whether he or *Eyre* bought it, he puts himself expressly in the place of an original contractor; the Court then cannot say that he was a sub-contractor. This declaration was *before* the purchase of the cargo of the Earl of *Chatham*, on which the action is brought.

Kilbington, the keeper of *Greenland-dock* proved that *Hatterſley* and *Pugh* both said to him, "we have purchased your oil." This was a direct avowal of their having jointly contracted, which was not done with a view to strengthen the credit of *Eyre* and Co., being after the purchase was made.

When Captain *Dowſon* expressed some doubts whether *Eyre* and Co., to whom he had also sold his oil, were able to pay him, *Pugh*, who received it, told him, "you are safe," and declared that *he was concerned, and Hatterſley was concerned, and a house at Norwich who could buy them all.* Now if they were sub-contractors, this declaration was not true; how could their sub-contract make the *vendor safe?* Here then is clearly a direct acknowledgment of their being original contractors. The evidence also of the broker

shows

ſhows that they all originally contracted: he delivered accounts to them, and informed *Hatterſley* and *Pugh* how matters went on. In one inſtance he was ſo conſcious of their being jointly concerned, that he gave in their names as ſuch to the agent of Yeomans, who would not otherwiſe have given credit to the name of *Eyre* and Co.

"Upon failure of *Eyre* and Co., *Hatterſley* and *Pugh* gave orders to the keeper of the docks not to give up the oil remaining in the dock in the name of *Eyre* and Co., and took it as their own. Now they could have had no right to do this, if they had been only ſub contractors. Admitting that, after goods are delivered, there cannot be ſuch a participation of profit and loſs as will make a partnerſhip, unleſs the parties originally contracted; yet their dividing the goods, and each taking his ſhare, after delivery, will be good evidence of an original contract. Whether the contract were joint or ſeparate, nothing done ſubſequent can alter the nature of it, but there may be ſubſequent evidence to prove of what nature it was.

"It has been ſaid that as the credit was given to *Eyre* and Co. only, the vendors could not be injured if *Eyre* and Co. only were liable. But this argument goes to prove that no dormant partner would be anſwerable for the acts of the oſtenſible agent. I am therefore of opinion that a new trial ought to be granted."

Lord *Loughborough*, Ch. J. ſaid, "The firſt impreſſion on my mind was againſt the defendants, but in the courſe of the trial my opinion changed, and I thought they were not liable as partners: I ſtill continue to think ſo, and conſequently that the verdict was proper.

This being an action on a contract of ſale, the vendor can have no remedy againſt a perſon with whom he has not contracted, unleſs there be a partnerſhip, in which caſe all the partners are liable as one individual. It has been juſtly obſerved, that a ſecret partnerſhip can be no conſideration to the vendor; though, for reaſons of policy and general expedience, the law is poſitive with reſpect to the ſecret partner, that when diſcovered, he ſhall be liable to the whole extent. In many parts of *Europe* limited partnerſhips are admitted, provided they be entered on a regiſter; but the law of *England* is otherwiſe, the rule being, that if a partner ſhares in advantages, he alſo ſhares in all diſadvantages. In order to conſtitute a partnerſhip, a communion of profits and loſs

is essential. The shares must be joint, though it is not necessary they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. The late case of the cotton purchase resembled the present, so far as the several parties were each to take aliquot shares; but there, no part of the commodity was to be re-sold, without the consent of all concerned. Here *Eyre* was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may, by other purchases, have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them necessary to make them partners; their agreement was a sub-contract; which, as my brother *Heath* observed, may be executory; it was to share in a purchase to be made. The seller looked to no other security but *Eyre* and Co. to them the credit was given, and they only were liable."

So, where several persons agreed to make an out-fit, and each adventurer was to purchase a quantity of goods, and bring it into the common stock, the price of a parcel of goods so bought was held an individual debt, which could not be recovered from the other adventurers. (*p*)

But, a contract made by two partners to pay a certain sum of money to a third person equally out of their own *private cash*, is a *joint contract*, and they must be *jointly* sued upon it. (*q*)

So, in another case, (*r*) where A. having neither money nor credit, offers to B. that if he will order with him certain goods to be shipped upon an adventure, if any profit should arise from them, B. *should have half for his trouble*; B. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone; it was holden that he was entitled to recover back such payment in *assumpsit* against A., who had not accounted to him for the profits.

(*p*) Saville *v.* Robertson, 4 *Term Rep.* 720.
(*q*) Byers *v.* Dobey, 1 *H Bl.* 236.
(*r*) Hesketh *v.* Blanchard and another, executors of Robertson, 4 *East. Rep.* 144.

Lord

Lord *Ellenborough*, Ch. J. ſaid: "The diſtinction taken in *Waugh* v. *Carver* and others,* applies to this caſe. *Quoad* third perſons it was a partnerſhip; for the plaintiff was to ſhare half the profits. But as between themſelves it was only an agreement for ſo much, as a compenſation for the plaintiff's trouble, and for lending *Robertſon* his credit."

Where two perſons jointly carry on buſineſs as partners, but one only appears, and is known in the concern, and is permitted to repreſent himſelf to the world as a ſole trader, that one ſhall not be allowed to ſet up partnerſhip as a defence to an action brought againſt him only.

Thus, in the caſe of *Stracy*, *Roſs*, and others, *v. Deey*, (*s*) which was an action of *aſſumpſit* for goods ſold: pleas, *non aſſumpſit* and a ſet-off. The plaintiffs jointly carried on trade as grocers, but *Roſs* was the only oſtenſible perſon engaged in the buſineſs, and appeared to the world as ſolely intereſted therein, By the terms of the partnerſhip *Roſs* was to be the apparent trader, and the others were to remain mere ſleeping partners. The defendant was a policy broker, and being indebted for grocery (as he conceived) to *Roſs*, he effected inſurances, and paid premiums on account of *Roſs* ſolely, to the amount of his debt, under the idea that one demand might be ſet off againſt the other. *Roſs*'s affairs being much deranged, payment of the money due from the defendant was demanded by the firm, and was refuſed by him upon the ground of his having been deceived by the other partners keeping back and holding out *Roſs* as the only perſon concerned in the trade. Lord *Kenyon*, Ch. J. was of opinion, that as the defendant had a good defence by way of ſet-off, as againſt *Roſs*, and had been by the conduct of the plaintiffs led to believe that *Roſs*, was the only perſon he contracted with, they could not now pull off the maſk and claim payment of debts ſuppoſed to be due to *Roſs* alone, without allowing the parties the ſame advantages and equities in their defence that they would have had in actions brought by *Roſs*.

* *Ante* 286. (*s*) *At* Guildhall, *Sittings after Mich. Term.* 1789. *Coram Lord* Kenyon, 7 *Term Rep.* 361. *n. c.*

2. *What Contracts, &c. made by one Partner shall bind himself and his Co-partner.*

If one of several partners draws, accepts, or indorses a bill or note, or enters into any other contract not under seal, in the name of the partnership firm, for any thing relating to the joint concern, all the partners are bound by it, and liable to the person with whom the obligation is made, if he has acted *bonâ fide*. The same liability may also, in some instances, be incurred upon a bill or other negotiable instrument given by one partner in the name of the partnership firm for his own *separate* debt or concern.

Thus, in the case of *Swan* and others v. *Steele, Clerk*, and *Wood*,(*t*) which was an action of *assumpsit*, wherein the plaintiffs declared, first, on a bill of exchange, dated 26th of *August*, 1803, drawn by *D. Maitland* on *Campbell* and Co. for 342*l.* payable to the order of the defendants, and one *George Payne*, deceased, three months after date, and indorsed by the defendants and *Payne*, under the firm of *Wood* and *Payne* to the plaintiffs; and which bill *Campbell* and Co. had accepted. The plaintiffs also declared for goods sold and delivered, and on the common money counts. The defendant *Steele* pleaded *non assumpsit*, and the defendant *Wood* suffered judgment by default. At the trial, the jury found a verdict for the plaintiff for 368*l.* 5*s.* 4*d.*, subject to the opinion of the court on the following case.

"*Wood* and *Payne*, mentioned in the pleadings, were *wholesale grocers* in *Liverpool*, trading under the firm of *Wood* and *Payne*, from *January* 1802, until *January* 1804; with whom the defendant *Steele* became a partner in *May* 1802, and so continued till *January* 1804, *in the business of buying and selling cotton*; which business was also carried on under the same firm of *Wood* and *Payne*, and at their counting house; but *Steele* was never interested in the grocery business. *Steele* took no active part in the *cotton* concern; nor was it known to the world or to the plaintiffs that he was a partner. *The plaintiffs sold to* Wood *and* Payne, *as grocers, a quantity of sugar, for which they gave their acceptance in the firm of* Wood *and* Payne at four months, due the 11th of *October*, 1803; and not being able to provide for it when due, *Wood* and *Payne* on

(*t*) 7 *East.* 210.

the

the 8th of *October*, 1803, delivered to the plaintiffs the bill mentioned in the declaration due the 29th of *November*, with others, to provide for that acceptance; and the bill was indorſed by either *Wood* or *Payne* in the firm of *Wood* and *Payne*, without the actual knowledge of *Steele*, as all other bills in the cotton concern were. The ſaid bill had been paid to *Wood* and *Payne*, as cotton dealers by the drawer thereof for cotton ſold to him, in which *Steele* was, as aforeſaid, intereſted; and the name "*D. Maitland*" thereto ſubſcribed as the drawer, was the handwriting of *D. Maitland* of *Wigan*, to whom the cotton was ſold. The ſaid bill has been diſhonoured, of which *Wood* and *Payne* had due notice. *Wood* and *Payne* became bankrupts on the 16th *January*, 1804, and the effects of the cotton concern were inſufficient to diſcharge its debts; and *Steele* when he ſhould have diſcharged thoſe debts would have been a creditor of the concern. The queſtion for the opinion of the court was, whether the plaintiffs were entitled to recover? If they were, then the verdict was to ſtand; otherwiſe, a verdict was to be entered for the defendant *Steele*." (*v*)

The court were clearly of opinion, that the plaintiffs were entitled to recover.

Lord *Ellenborough*, Ch. J. ſaid: "It would be a ſtrange and novel doctrine to hold it neceſſary for a perſon receiving a bill of exchange indorſed by one of ſeveral partners, to apply to each of the other partners to know whether he aſſented to ſuch indorſement; or otherwiſe that it ſhould be void. There is no doubt that in the abſence of all fraud on the part of the indorſee, ſuch indorſement would bind all the partners. There may be partnerſhips where none of the exiſting partners have their names in the firm. Third perſons may not know who they are; and yet they are all bound by the acts of any of the partners in the name or firm of the partnerſhip. The caſe is too clear for argument, and I ſhould not have permitted the point to be reſerved, if I had not underſtood at the trial that there were ſome other facts in the caſe which might raiſe a doubt. The diſtinction is well ſettled, that if a creditor of one of the partners collude with him to take payment or ſecurity for his individual debt out of the partnerſhip funds, knowing at the time, that it is without the conſent of the

(*v*) *It does not appear from the caſe how* Clerk, *one of the defendants, became a party.*

other partner, it is fraudulent and void; but if taken *bonâ fide* without ſuch knowledge at the time; no ſubſequently acquired knowledge of the miſconduct of the partner in giving ſuch ſecurity can diſaffirm the act. Now here the three perſons were trading under the firm of *Wood* and *Payne*, and in the courſe of their dealings as partners received the bill in queſtion; and it was competent to either of them by his indorſement, in the name of the firm, to paſs their intereſt in the bill: and the plaintiffs ignorant of any fraud at the time, take it by ſuch indorſement from one of the partners. Then if the intereſt of the plaintiffs in the bill were once well veſted, no ſubſequent knowledge that ſuch indorſement was made without the conſent of one of the partners will deveſt it. And it would be highly inconvenient that it ſhould; becauſe if the plaintiffs had been apprized at the time, that the partner who indorſed the bill had no authority to do ſo, they might have obtained ſome other ſecurity for their demand.

But in the caſe of *Wells* v. *Maſterman* and others,(*u*) which was an action of *aſſumpſit* on two bills of exchange, drawn by the plaintiff on the defendants by the ſtyle of *James Maſterman* and Co. dated the 30th of *January* 1798; accepted by *James Maſterman* only, without the words *and Co.* The partnerſhip commenced in 1795.

James Maſterman carried on a ſeparate trade on his own account, and had had dealings with the plaintiff before his partnerſhip, who had alſo dealings with the firm.

The defence ſet up to this action was, that the bills were drawn on the ſeparate account, and for the ſeparate concern of *James Maſterman* only; and that the acceptance in queſtion did not bind the partnerſhip, ſo that an action could be maintained againſt them, as the acceptors of the bills in queſtion; and another bill of exchange was produced, drawn in the ſame ſtyle and manner as thoſe in queſtion, but accepted by *Maſterman* and Co. which had been paid.

Lord *Kenyon*, Ch. J. ſaid: "When a man enters into a partnerſhip, he certainly commits his deareſt rights to the diſcretion of every one who form a part of that partnerſhip in which he engages; and if a bill is drawn upon the partnerſhip in their uſual ſtyle and firm, and it is accepted by one of the partners, it certainly binds the partnerſhip to the payment of it: but if a man who has

(*u*) 2 *Eſp. Rep.* 731.

dealings

dealings with one partner only, and he draws a bill on the partnership on account of those dealings, he is guilty of a fraud, and in his hands the acceptance made by that partner would be void; but it would be otherwise in the case of a *bonâ fide* indorsee. In his hands, the acceptance of one of the partners binds the partnership, as he is ignorant of the circumstances under which it was created, and takes it on the credit of the partnership name."

So, where two partners contract a debt prior to the admission of a third partner, for which the creditor, at the instance of the the two, afterwards draws a bill upon the three in the name of the partnership firm; and the bill is accepted by the two, without the privity of the third, such creditor cannot recover upon it: though if such bill gets *bonâ fide* into the hands of an indorsee, all the partners are liable to him and may be sued thereon.

Thus, in the case of *Shirreff* and others v. *Wilks*, (*w*) which was an action upon the case upon a bill of exchange for 78*l.* dated the 5th of *November* 1796, payable to the order of the plaintiffs two months after date, which was stated in the declaration to have been drawn by them on the said *G. Bishop W. Robson*, and *J. Wilks*, by the name and description of Messrs. *George Bishop* and Company, and to have been accepted by them. The defendant *Wilks* pleaded the general issue, on which issue was joined.

The cause was tried before Lord *Kenyon*, Ch. J. at *Guildhall*, and a verdict was found for the plaintiffs for 90*l.* 10*s.* including interest on the bill; subject to the opinion of the Court of *King's Bench* on the question, whether the plaintiffs were entitled to recover under the following circumstances.

The plaintiffs in *October* 1795 sold and delivered a quantity of porter to *Bishop* and *Wilks*, who were then partners, which porter was entered in the plaintiffs' books in the names of *Wilks* and *Bishop*; and the same was afterwards shipped for the *West Indies*, and the defendant *Wilks* paid the shipping charges. *Robson* became a partner with *Bishop* and *Wilks* in *April*, 1796, and continued so till the 8th of *November* following, when their partnership was dissolved. The defendant *Wilks* previous to the dissolution of the partnership sent to the plaintiffs a memorandum or calculation in his own handwriting of certain deductions claimed

(*w*) 1 *East Rep.* 48.

by him in reſpect of the porter. The balance due to the plaintiffs in reſpect of the porter was 78*l.* for which the plaintiffs drew upon the defendants the bill mentioned in the declaration, which bill was accepted by *Biſhop* in the partnerſhip firm of all the defendants by his ſubſcribing thereon "Accepted *G. B. and Co.*"

The court were of opinion that the plaintiffs were not entitled to recover.

Lord *Kenyon*, Ch. J. ſaid: "I do not know how this caſe came to be reſerved for the opinion of the court; for I have decided the ſame queſtion repeatedly at the ſittings, and the propriety of my deciſion has never been canvaſſed again upon a motion for a new trial. This is an action brought againſt three perſons, *Wilks*, *Biſhop*, and *Robſon*, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by *Biſhop* alone in the name of the firm. The conſideration for this bill was ſome porter which had been ſold by the plaintiffs to *Wilks* and *Biſhop* only, at a time when *Robſon* had no concern with the houſe. Then the plaintiffs knowing this, drew the bill upon all the three partners, and knowingly take an acceptance from one of them to bind the other two, one of whom, *Robſon*, had no concern with the matter, and was no debtor of theirs; no aſſent of his being found, and nothing ſtated to ſhow that he had any knowledge of the tranſactions. It is hard enough for one partner, in any caſe, to be able to bind another without his knowledge or conſent, but it would be carrying the liability of partners for each other's acts to a moſt unjuſt extent, if we ſuffered a new partner to be bound in this manner for an old debt incurred by other perſons. The plaintiffs therefore ought not in juſtice to have taken this ſecurity by which they were to bind one who was not their debtor: the tranſaction is fraudulent upon the face of it. It is no anſwer to ſay, that one partner has a general power of binding the reſt. So an executor has power to bind the aſſets of the teſtator, and to ſell and diſpoſe of his effects and the law repoſes a confidence in him, that he will apply the proceds in payment of the teſtator's debts, and legacies: but if fraud could be proved in any particular tranſaction between the executor and a purchaſer, ſuch a ſale would be void.

Nothing can be better eſtabliſhed, as a general rule, than, that the law will ſet aſide every contract which is fraudulent. Such is the caſe here. *Wilks* and *Biſhop* owed money to the plaintiffs; theſe latter, knowing that *Robſon* had no concern with the matter,

ter, fraudulently receive from *Wilks* and *Bishop* a security by which *Robson* is to be bound: this therefore cannot be enforced in this action."

Lawrence, J. said: "The plaintiffs in this action declare as upon a promise by three defendants, and consequently to entitle themselves to recover they must prove a promise either express or implied binding upon all the three: in this they have failed, and therefore there must be judgment against them. In addition to the authorities cited by my Lord to show that *Robson* was not bound by this act of his partners, is the case of *Hope* v. *Cust*. [He then read the following note from a MS. of the late Mr. Justice *Buller*, taken by him, when he was at the bar.] "*Hope* v. *Cust*, sittings at *Guildhall* after *Mich. Term*, 1774, Mr. *Fordyce* who traded very largely in his separate capacity, as well as in the business of a banker, in partnership with others, having considerable dealings in his private capacity with *Hope* and Co. in *Holland*, did, for and in the names of himself and partners, give them a geneneral guarantee for the money due from him in his separate capacity. *Fordyce* became a bankrupt, and afterwards all the partners became bankrupts. And a bill was filed in the Court of *Chancery* by *Hope* and Co. in order to have the benefit of this guarantee: upon which that court directed an issue to try the validity of it. Lord *Mansfield*, in summing up the evidence to the jury, said, "There is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guarantee in the name of all the partners it binds all. But there is no general rule which may not be infected by covin, or such gross negligence as may amount to, or be equivalent, to covin: for covin is defined to be a contrivance between two to defraud or cheat a third. Therefore the whole will turn on this, whether the taking the guarantee from *Fordyce* himself in his own handwriting, without consulting the other partners, or having their privity, is not such gross negligence in the *Hopes* as will amount to a fraud or covin. *Fordyce* was acting in two several capacities, having transactions in his own name only, for his own separate benefit, and in the names of the partnership for his own benefit. This case comes out of *Chancery*, where an affidavit or answer of all parties might have been had if necessary; but none such has been produced, and therefore it must be taken that the partners knew nothing of it, and

and had no profit by it, or privity in the tranſaction. Another fact to be granted is, that as between *Hope* and Co. and *Gurnal* and Co. and *Fordyce*, the whole tranſactions are avowedly with *Fordyce* only in his ſeparate capacity. The next fact is the correſpondence in 1770, preceding the ſecond guarantee. It is clear that *Fordyce*'s depoſits and intereſts in the funds were both doubted, and then the *Hopes* tried to make a ſcheme to get a ſecond ſecurity without ſhocking him, by ſuggeſting there was a new partner. The firſt guarantee was given in 1764, and that never had been called in, and ſtill exiſted. There was then no occaſion for a new one: for the change of a partner, and taking in a new one, would not deſtroy a former guarantee. The ſcheme was to get ſecurity for debts not well ſecured, the goodneſs of which was doubted; and they therefore get this from *Fordyce* alone, clandeſtinely, without the knowledge of his partners. If the fact be clear that *Hope* and Co., and *Gurnal* and Co., knew that this was done to cheat the partners of *Fordyce*, there is no queſtion in the cauſe. But it is manifeſt that they truſted to it as binding on the partnerſhip. Therefore this brings it to the ſecond queſtion, whether it be not a groſs negligence; eſpecially as they knew at the time that *Fordyce* was acting in his ſeparate capacity; and this ſecurity was intended to indemnify them againſt his ſeparate debts. Verdict for the defendant. Lord *Mansfield* afterwards, in his report to the Court of *Chancery*, on a motion being made for a new trial, ſaid, three things were eſtabliſhed to the ſatisfaction of himſelf and the jury. Firſt, that the tranſactions between *Hope* and Co. and *Fordyce* were wholly on *Fordyce*'s account. Secondly, that the partners of *Fordyce* derived no profit or benefit whatſoever from them. Thirdly, that they had no notice of the guarantee; and conſequently did not acquieſce in it. And Lord *Mansfield*, ſaid, he left it to the jury, whether under theſe circumſtances the taking of theſe guarantees were, in reſpect of the partners, a fair tranſaction or covinous, with ſufficient notice to the plaintiffs of the injuſtice and breach of truſt *Fordyce* was guilty of in giving them."

So, in the caſe of *Arden* v. *Sharpe* and *Gilſon*, (x) which was an action of *aſſumpſit* by the plaintiff as indorſee of a bill of exchange drawn by *R. Cowan* on one *Rae*, at two months after date in favour of

(x) 2 *Eſp. Rep.* 524.

R. Packer

R. Packer for 60*l.* dated the 4th of *March* 1796. The caſe as proved, on the part of the plaintiff, was, that on the 1ſt of *March*, the day on which the bill bore date, *Gilſon*, one of the defendants, brought the bill in queſtion to the plaintiff, and requeſted him to diſcount it; the plaintiff ſaid he could not do it himſelf, upon which the defendant *Gilſon* anſwered, he could get it done for him, but wiſhed the buſineſs to be kept a ſecret from his partner Mr. *Sharpe*; to which the plaintiff aſſented and took his bill. The witneſs then proved, that the indorſement "*Sharpe* and *Gilſon*" was in the handwriting of *Gilſon*. On this evidence the plaintiff reſted his caſe.

Lord *Kenyon*, Ch. J. ſaid: "This action, under the preſent proof, cannot be ſupported; the bill is indorſed by one partner, in the name of the firm; one partner certainly may indorſe a bill in the partnerſhip name, and if it goes into the world, and gets into the hands of a *bonâ fide* holder, who takes it on the credit of the partnerſhip name, and is ignorant of the circumſtances, though in fact the bill was firſt diſcounted for that one partner's own uſe; in ſuch caſe the partnerſhip is liable; but the caſe is different where the party who brings the action was himſelf the perſon who took the bill with the indorſement by one partner only, and was informed that the tranſaction was to be concealed from the other; *he* cannot ſue the partnerſhip, the tranſaction indicates that the money was for that partner's own uſe, and not raiſed on the partnerſhip acccount, therefore ſhall not be allowed to reſort to the ſecurity of the partnerſhip, to whom in the original tranſaction he neither looked or truſted." The plaintiff was accordingly non-ſuited.

So, an authority given to one partner, on the diſſolution of a partnerſhip, to receive all debts *owing to*, and to pay thoſe *owing from* the late partnerſhip, does not authorize him to indorſe a bill of exchange in the name of the partnerſhip, though drawn by him in that name, and accepted by a debtor of the partnerſhip after the diſſolution.

Thus, in the caſe of *Abel* and another v. *Sutton*, (*y*) which was an action brought by the plaintiffs, as indorſees, againſt the defend-

(*y*) 3 *Eſp. Rep.* 108. *See alſo* Kilgour *v.* Finlyſon *and others*, 1 *H. Bl.* 155. *S. P.*

ant,

ant, as surviving partner of one *Poynter*, upon a promissory note for 685*l.* 11*s.* dated the 27th of *May*, 1799, and payable in six months after date, drawn by Messrs. *Horton and Co.* in favour of *Sutton and Co.* and indorsed in the partnership name of *Sutton and Co.* to the plaintiffs.

The defendant and *Poynter* had carried on business in partnership, under the firm of *James Sutton and Co.* On the 31st of *May*, 1799, the partnership had been dissolved, and notice of the dissolution published in the *London Gazette* of the 1st of *June*: and the defence was, that the note in question was an accommodation one, created after the dissolution of the partnership, though it bore date before; and the partnership name put on by *Poynter* alone, without authority from the defendant; or that even if it existed prior to the dissolution, it had not been put into circulation until after. The indorsement, "*James Sutton and Co.*" was in the handwriting of *Poynter*, and it appeared clearly that it had not been made till the 28th of *August*, nearly two months after the dissolution of the partnership: but it was stated, and admitted to be the custom of trade, that when bills or notes had a long time to run, it was not usual to put them into circulation until near the time they became due, or when they had about the usual time of discountable securities to run.

For the plaintiffs it was contended, that where a partnership had been dissolved, and one of the partners had authority given him to settle and liquidate the partnership accounts, and due notice to that effect was given (as in the present case in the same advertisement in the *Gazette*) which contained notice of the dissolution of the partnership) such partner had a right to use the partnership name in negotiating bills or securities which existed previous to the dissolution, until the accounts were liquidated: and Mr. *Barnewall*, one of the special jurymen, said, it was very customary for one partner to use the partnership name long after it was notoriously dissolved, in negotiating the partnership securities, for the purpose of liquidating the partnership accounts, and winding up the concern; and observed, that many bills could not be received if the partnership name was not upon them.

For the defendant it was argued, that as the declaration stated *Sutton* and Co. indorsed the note, it was necessary to show that the partnership existed at the time the note in question was indorsed; and

and he cited *Dixon* v. *Evans*, 6 Term Rep. 57, in ſupport of this poſition.

Lord *Kenyon*, Ch. J. ſaid, "If a fair bill exiſted at the time of the partnerſhip, but is not put into circulation until after the diſſolution, all the partners muſt join in making it negotiable. The moment the partnerſhip ceaſes, the partners become diſtinct perſons: they are tenants in common of the partnerſhip property undiſpoſed of from that period; and if they ſend any ſecurities which did belong to the partnerſhip into the world, after ſuch diſſolution, all muſt join in doing ſo. I even doubt much, if an indorſement was actually made on a bill or note before the diſſolution, but the bill or note was not ſent into the world until afterwards, that ſuch indorſement would be valid."

In the courſe of the cauſe a witneſs was called who had been clerk to *Poynter*. He was aſked if he did not know that *Poynter*, after the diſſolution of the partnerſhip, had put the partnerſhip name on bills antedated to a time previous to the diſſolution. This queſtion was objected to on the ground that it aſſumed as a fact that bills had been antedated, without ſhowing that ſuch bills in fact did exiſt.

Lord *Kenyon*, Ch. J. was clearly of opinion, that the queſtion was a legal one; and one of the counſel mentioned the caſes of indorſements by procuration, in which it was every day's practice to aſk witneſſes, if bills had been indorſed by procuration, without producing any ſuch.

It was then given in evidence that *Poynter* had received money for ſecurities belonging to the partnerſhip, which had been thrown into the general fund, and had been applied in liquidation of the partnerſhip debts, after the diſſolution. The counſel for the plaintiffs, in reply, ſtated two poſitions in ſupport of the plaintiff's claim; 1ſt, that if bills exiſted before the diſſolution of the partnerſhip, and one of the partners had authority to ſettle and liquidate the partnerſhip accounts, ſuch partners had a right to put the partnerſhip name upon ſuch bills; and that a *bonâ fide* holder of ſuch bill would have a right to reſort to all the partners: 2dly, that if he put into circulation bills in the partnerſhip names, upon which money had been raiſed, which was applied in liquidation of

of the partnerſhip debts, it was money had and received to the uſe of all the partners, and all would be liable.

Lord *Kenyon*, however, (after obſerving that there was no evidence to ſhow that the money raiſed upon the bill in queſtion had been ſo applied) expreſſed his moſt decided diſſent to both poſitions: he ſaid, "it could never be allowed that any one might make another his debtor againſt his will: by that means, a man's greateſt enemy, by paying his debts, might make himſelf his creditor. The moſt miſchievous and diſtreſſing conſequences might enſue from ſuch a doctrine. He had often ruled, that it could not be done; and he was ſtill of the ſame opinion. With reſpect to the other poſition, his Lordſhip ſaid, when a man takes a partner, he takes him for better, for worſe; he repoſes confidence enough, and places himſelf ſufficiently in the power of his partner during the partnerſhip. To contend that this liability to be bound by the acts of his partner, extends to a time ſubſequent to the diſſolution, was, in his mind, a moſt monſtrous propoſition. A man in that caſe could never know when he was to be at peace, and retired from all concerns of the partnerſhip, if one partner was to have the power of binding another, long after the diſſolution of the partnerſhip. I am of opinion, ſaid his Lordſhip, if a bill is ſent into circulation after the diſſolution of a partnerſhip, that, beyond all controverſy, all the partners muſt join in the indorſement; and one, by putting the partnerſhip name, cannot bind the reſt." The jury accordingly found a verdict for the defendant.

Where two partners give a joint bill of exchange for a partnerſhip demand, which is not paid when due, and the holder takes a *ſeparate* bill, or ſecurity, of one of the partners, without the knowledge of the other, the latter is thereby diſcharged.*

Money lent to one partner, whilſt he is engaged in the partnerſhip buſineſs, in order to defray certain expences of travelling, ſhall be deemed a partnerſhip debt, and recoverable againſt all the partners.

Thus, in the caſe of *Rothwell* v. *Humphreys* and *Howell*,(z) which was an action of *aſſumpſit* for money lent. The defendants were partners, carrying on the buſineſs of linen-drapers, in *London*; the

* *Vide* 4 *Eſp. Rep.* 91. 5 *Eſp. Rep.* 122. (z) 1 *Eſp. Rep.* 406.

plaintiff

plaintiff was a fuſtian manufacturer at *Mancheſter*. *Howell*, one of the defendants, had gone down to *Mancheſter*, to purchaſe goods, in the way of his trade, and had, in fact, purchaſed from the plaintiff, to the amount of 500*l.* Being about to return, he borrowed 10*l.* from the plaintiff, to defray his expences to *London*; and having drawn a bill on the houſe in *London* for the amount of the goods, he included in it the 10*l.* ſo borrowed, and the bill was drawn for 510*l.*

Before the arrival of the goods in *London*, *Humphreys* and *Howell*, the defendants, became inſolvent; and the plaintiff ſtopped the goods *in tranſitu*; ſo that the bill was never preſented, and the action was brought to recover the 10*l.* lent only.

The defence relied upon was, that the action was brought againſt both partners for a loan of money admitted by the evidence, to have been made to one of them, and which therefore could not be ſupported.

But Lord *Kenyon*, Ch. J. ſaid, "that though the loan of money was to one of the partners, it was lent to him while employed in the partnerſhip buſineſs, and on its account; that as ſuch, it was competent to him to bind the partnerſhip to the payment of a debt ſo contracted, and which, in fact, he had done, by including the money lent in the ſame bill with that for goods ſold clearly on the partnerſhip account." A verdict was accordingly found for the plaintiff.

So, where one of ſeveral partners receiving money, or goods, of a third perſon, in the uſual courſe of buſineſs, on the partnerſhip account, in order to be applied to a particular purpoſe, wrongfully miſapplies ſuch money, or goods, to his own private uſe, all the partners are anſwerable.

Thus, in the caſe againſt *Layfield* and others, (*a*) which was an action on the caſe for money had and received to the plaintiff's uſe, it appeared, upon evidence, that *Layfield* and the other defendants were bankers and partners, and that the plaintiff had given *Layfield* 20*s.* for which he received a ticket in the double exchange lottery, and *Layfield* undertook to pay what benefit ſhould happen thereupon; that the ticket came up a 40*l.* benefit; and for that money the action was brought. It was objected for the defendants, that the action was brought againſt *Layfield* and his

(*a*) 1 *Salk.* 292. *Holt's Rep.* 434. *S. C.*

partners;

partners; whereas it did not appear that any of them had undertaken to be truſtees in the lottery, except *Layfield*, and therefore he only ought to be charged, and not his partners.

But *Holt*, Ch. J. anſwered, that it appeared they were partners in their trade, and goldſmiths, and the adventurers put their money in upon the credit of ſeveral goldſmiths, that had undertaken to pay the benefits; and it ſhould be preſumed the act of *Layfield* was the act of the other, and ſhould bind them, unleſs they could ſhow a diſclaimer, and a refuſal to be concerned in it. Accordingly the plaintiff had a verdict for forty pounds.

So, if *two* perſons are in partnerſhip as *attornies* and *conveyancers*, and *one* of them receives money to be laid out on *mortgage*, but miſapplies it, the other is liable for the amount.

Thus, in the caſe of *Willet* v. *Chambers*, (*a*) which was an action of *aſſumpſit* for money had and received to the plaintiff's uſe, brought againſt the defendant, as *ſurviving partner* of one *Dadley*. At the trial a verdict was found for the plaintiff, damages 480*l.*: and upon a rule to ſhow cauſe why a new trial ſhould not be granted, the facts appeared to be as follow: that, prior to any partnerſhip between the defendant and *Dadley*, who was an attorney and conveyancer, at *Coventry*, the latter, in the year 1771, received of a Mr. *Bindley* the ſum of 350*l.*, to be laid out on a real ſecurity. *Dadley* accordingly furniſhed him with a mortgage from a Mr. *Hughes* to that amount; which, as it afterwards appeared, *Dadley* had forged. At *Midſummer* 1776 *Dadley* and *Chambers* entered into partnerſhip; ſhortly after which, *Bindley* wanted to call in his money. The pretended mortgagor was ſuppoſed at the ſame time to want a further ſum of 150*l.*, which, added to the original mortgage money, made together the ſum of 500*l.* The plaintiff, *Willet*, was ready to advance this ſum; and, in conſideration of his doing ſo, an aſſignment was made to him of the pretended mortgage before made to *Bindley*, as to 180*l.* part of this ſum of 500*l.* *Willet* paid it into *Dadley*'s office to *Chambers*, who gave the following receipt for it: "Received of Mr. *Benjamin Willet*, the "ſum of 180*l.*, for which I promiſe to account to him on de- "mand. *Chambers*."

Dadley was not at home when this ſum was paid. Some time after, the plaintiff called at the office to pay 300*l.* more, part of

(*a*) *Cowp.* 814.

the

the remaining 320*l.* due. *Dadley* being then at home, *Willet* paid the money to him; and, in return, *Dadley* gave him the following receipt: "Received on account of Mr. *Benjamin Willet*, 300*l.* the "remainder of the money to be paid, being 20*l.* *Dadley.*"

It was admitted that the defendant, *Chambers*, was in no reſpect privy to the forgery; and that no procuration money was paid either to *Chambers* or *Dadley*.

The Court refuſed the rule, and determined this to be a partnerſhip tranſaction, and that the defendant was anſwerable for the act of his partner. Lord *Mansfield*, Ch. J. ſaid, "Both parties in this caſe undoubtedly are innocent; and the loſs that will fall upon the defendant, if the law is againſt him, will be much greater than that which will be ſuſtained by the plaintiff, if he fails. It is indeed ſo hard a caſe upon the defendant, that every leaning of the Court would be in his favour. But the queſtion is, "Whether, in point of law, this engagement with *Dadley* does not make *Chambers* anſwerable?"

To go by ſteps; it is neceſſary to ſee what the buſineſs was which *Dadley* carried on alone, before his connection with the defendant, in the year 1776. By admiſſion of the counſel on both ſides, it was the buſineſs of an attorney and conveyancer. By proof in the cauſe, it appears to have been a great deal more: for he had many appointments, though the nature of them is not particularly mentioned. He had alſo agencies, and was clerk to a navigation. But there is no pretence that he ever received procuration-money. The buſineſs of conveyancing, in the very nature of it, as carried on in the country, is this: where there is an attorney, or counſel of credit, they receive money to place out upon ſecurites; and perſons who want to borrow, as well as thoſe who want to lend, apply to them for that purpoſe. Their profit ariſes from having the money in their hands before it is laid out upon the intended ſecurities; and from their fees and bills of charges upon the conveyances they draw. It is not diſputed but that this was the nature of *Dadley*'s conveyancing buſineſs: he did not act however as a ſcrivener, who ſometimes does not touch the money, but who in all caſes gets procuration-money. There is no proof of any tranſaction of that kind; nor indeed is it cuſtomary for attornies like him to do ſo; for they get profit enough without it. I remember a caſe before me of a perſon who was truſted to

the amount of many thousand pounds, in the manner I have stated, and that is the nature of the business.

This was the business of *Dadley* before the partnership. Let us see then what was the nature of the partnership afterwards entered into, between *Dadley* and the present defendant; whether it was a general partnership in *Dadley*'s business, or confined to one particular branch of it only; for to be sure there may be such a confined partnership. The evidence as to this point consists in the heads and terms of an agreement entered into between them, which were afterwards extended and reduced into form. From them it appears there was no particular restriction; it was not to be confined to suits, nor to conveyancing only; but they were to be partners in the business which Mr. *Dadley* carried on. Each was to be worth a certain sum: the profits are stated at 800*l*. Then it is agreed that a provision shall be made for the family of whichever of them should happen to die first. And then comes the following clause, at the end, which, though not taken notice of by the counsel on either side, is very material indeed upon this occasion. My object in examining it particularly was, to see whether it contained any restriction. The clause is this: "Note, this scheme "of partnership is intended to include all Mr. *Dadley*'s present and "future practice and appointments, such as agencies, navigation-"clerk, &c. but not to extend to any public office or place, "which may at any future time be given to either of the parties." The only restriction, therefore, is that; or, more properly speaking, it is the only exception to this general partnership.

Thus, the partnership commences, without waiting for articles; and from that time the business was carried on in partnership. One branch in that business was conveyancing. Incident to conveyancing is the receiving of money to place out upon securities. Receiving it from the lender to advance to the borrower, and acting for both parties respectively. From that the profit arises; not from procuration-money, but from the money lying in their hands before it is placed out; and when placed out, from the charges and fees for drawing and engrossing the conveyances.

The facts then are shortly these:—the plaintiff *Willet*, wanting to place out a sum of 500*l*, applies to the office, without making any distinction between the two partners. The first sum he advances is 180*l*.; this he pays to *Chambers*, who gives a receipt for it, not expressing it to be for *Dadley*, or for what, or whose use;

but

but making himself accountable for the amount, on demand. He receives it therefore as the principal, not as the agent of *Dadley*; and it is admitted he knew the use, by placing it out upon the security for which it was put into his hands. The next sum, which was 300*l.*, is paid by the plaintiff to *Dadley*, who receives it exactly in the same manner as *Chambers* did the former sum—as principal; and gives a receipt for it, not as for so much money to be placed out, but as a sum for which he was to be accountable. The two sums together come within 20*l.* of what was wanted upon the security. Afterwards the bill for conveyancing is brought in. *Hughes* being the original mortgagor, if he had not been a fictitious person, and had wanted a further sum of money upon the assignment, he should have paid the expence of conveyancing. But the bill is brought in to the plaintiff, and made out, "debtor to *Chambers* and *Dadley*." *Chambers* receives the money, and gives a receipt for it. In that transaction, therefore, he is clearly considered as a partner, and the transaction itself as a partnership transaction. If *Dadley* had received procuration-money, and that kind of dealing had been excepted out of the articles, or, if separate accounts had been kept of the money got by these transactions, and it had all been set down to the profits of *Dadley* only, it might have varied the case: and Mr. Justice *Ashhurst*, who tried the cause, would have been very glad to have given a direction in favour of the defendant. He suffers by the rascality of a man who had a very good character. I am very sorry for the defendant; but upon this evidence I cannot say but that it is a partnership transaction."

So, where one of two partners, being a trustee, applied trust-money to the use of their joint-trade with the privity of the other partner; and they afterwards separated, and by agreement the partnership effects were assigned over to the first partner, who took upon himself the payment of the joint-debts; this was held to be no payment in discharge of the other partner, but that both were liable to make good the trust-money. (*b*)

So, an action cannot be maintained by several partners for goods sold by *one* of them living in *Guernsey*, and packed by him in a particular manner, for the purposes of smuggling, though the other partners, who resided in *England*, knew nothing of the sale;

(*b*) Smith *and others v.* Jameson *and another*, 5 *Term Rep.* 601.

for it is a contract by subjects of this country, made in contravention of the laws: and the Court said that the case must be considered in the same light as if all the parties lived in *England.* (*c*)

One partner cannot bind his copartner by deed or writing under seal, without an express authority from him, by writing under seal. (*d*)

It has, however, been determined, (*e*) that a bill of sale executed by one partner, with the consent and in the presence of the other, is binding upon both the partners.

3. *Of Contracts with a Partnership Firm, after a Change or Dissolution of Partnership; and of the Notice necessary to be given of such Change or Dissolution.*

Where a partnership consists of a certain number of persons, if any of the partners withdraw from the firm, and no notice is given thereof, any person, dealing with the partnership either before or after such change, has a right to call upon all the parties who at first composed the firm. (*f*)

But where three persons entered into partnership in the trade of sugar-boiling, and it was agreed that no sugars should be bought without the consent of the majority. One of them afterwards withdraws himself from the partnership, of which he gives public notice; and subsequent to this, the two other partners make a contract with A. for a large quantity of sugar, who had full notice that the third partner had withdrawn. It was determined that such third partner was not answerable for any part of the sugar so purchased. (*g*)

When partners dissolve their partnership, they should send notice to all persons who have trusted them as partners; a mere notice in the Gazette, in such case, not being sufficient.

(*c*) Biggs *v.* Lawrence, 3 *Term Rep.* 454.
(*d*) Harrison *v.* Jackson, 7 *Term Rep.* 207.
(*e*) Ball *v.* Dunsterville, 4 *Term Rep.* 313.
(*f*) Per Le Blanc *Just.* 3 *Esp. Rep.* 248.
(*g*) Minnit and Whinery, 5 *Bro. P. C.* 489. *oct. ed.* and 16 *Vin. Abr.* 254. *pl.* 12. *S. C.*

Thus,

Thus, in the caſe of *Graham* and others, v. *Hope* and others, (*h*) where it appeared that the defendants had been in partnerſhip together, and the plaintiff had ſold them goods as partners. Afterwards the partnerſhip was diſſolved, and notice of the diſſolution given in the *London Gazette*; and after this notice, the plaintiff had ſold and delivered the goods, for which the preſent action was brought.

The defendants called witneſſes, who ſwore that a notice had been given to the agent of the plaintiff, that the partnerſhip was diſſolved. The agent on the contrary poſitively ſwore that he had received no ſuch notice.

Lord *Kenyon*, Ch. J. before whom the cauſe was tried, told the jury, that "the cauſe depended entirely on the credit they gave to the witneſſes on the one ſide and the other. The *Gazette*, he thought, was not of itſelf ſufficient notice to the plaintiff of the diſſolution of the partnerſhip. His lordſhip ſaid, he did no ſay this for the purpoſe of this cauſe merely, but meant to lay it down as a general rule to govern the conduct of all men. Many people there were in this kingdom who never ſaw a *Gazette* to the day of their deaths, and very miſchevious would be the conſequences, if they were bound by a notice inſerted in it. It was incumbent on perſons diſſolving a partnerſhip, to ſend notice of ſuch diſſolution to all the perſons with whom they had had dealings in partnerſhip." The jury believing the defendant's witneſſes, gave a verdict for the defendant.

But a notice in the *Gazette* of the diſſolution of a partnerſhip is a ſufficient notice to all perſons who have had no previous dealings with the firm.

Thus, in the caſe of *Godfrey* v. *Turnbull* and another, (*i*) which was an action brought by the plaintiff, as indorſee of a promiſſory note againſt the defendants as the makers of it. The defendants had been partners in trade, but the partnerſhip had been diſſolved prior to the date of the note.

Macauley, one of the defendants, ſuffered judgment to go by default.

(*h*) *Peake's Cas. N. P.* 154. *See alſo* Gorham v. Thompſon, *Ib.* 42. *S. P.*
(*i*) 1 *Eſp. Rep.* 371.

The other defendant relied upon this circumstance, namely, that the note was made by the defendant *Macauley* only, after the dissolution of the partnership, who had put their joint names on it without any authority from him.

The note was dated the 6th of *April*, 1793. On the 19th of the *March* preceding, notice of the dissolution of the partnership, dated the 15th, had appeared in the *Gazette*.

The question was, whether the notice given in the *Gazette* was sufficient, so as to exonerate the defendant *Turnbull*.

Lord *Kenyon*, Ch. J. said: "In general, if a partner gives a note in the partnership name, all the partners are bound by it; and that is the case, even if given after the actual dissolution of the partnership, if that was not sufficiently notified, and the party who took the note, took it on the faith of the partnership name.

A secret dissolution of a partnership cannot discharge the partners; but if the dissolution is notified in the ordinary and usual way, as it is the only mode by which the fact of the dissolution can be promulgated to the world, at least, to those who have had no previous dealing with the partners, it seems sufficient, at least, to be left to the jury from thence to infer notice.

In many cases, notice in the *Gazette* is sufficient to subject a party to penalties, as in the cases of smuggling and outlawries. So, in the case of bankrupts, notice in the *Gazette* is sufficient for every purpose. In the present instance, there is no proof of any actual notice to Mr. *Godfrey*, the plaintiff, but the publication in the *Gazette* is proved, antecedent to his taking the note.

The jury are to judge from the practice in the usual course and ordinary mode of business. Notices are to be found in every *Gazette* of the dissolution of partnerships; which seems to point out that as the mode adopted by the world for notifications of this sort, and therefore every prudent man in business ought to consult them."

The jury, under this direction, found a verdict for the defendant, *Turnbull*.

4. *How Partners must sue and be sued.*

Upon a partnership contract or debt, *all the partners, or their Assignees, must sue and be sued*; the contract or promise being joint. And if one

one partner only ſues upon a joint contract, the action cannot be maintained; and the defendant may take advantage of this omiſſion at the trial, and nonſuit the plaintiff. But in an action for a *tort* or *wrong* this matter can only be taken advantage of by *plea in abatement*. (*k*)

The action upon the contract muſt, however, be brought at the ſuit of ſuch partners only as were in partnerſhip at the time of making the contract. (*l*)

But in the caſe of *Garret* v. *Taylor*, (*m*) where three had employed the defendant to fell ſome timber for them, in which they were jointly concerned; two of them he had paid their exact proportion, and they had given him a receipt in full of all demands; *the third now brought his action for the remainder, being his ſhare*; and it was objected, that as this was a joint employment by three, one alone could not bring his action: But it was ruled by Lord *Mansfield*, that *where there had been a ſeverance*, as above ſtated, that one alone might ſue.

In actions *againſt partners* all of them ſhould regularly be ſued; though if one be ſued alone, he can only take advantage of this omiſſion by *plea in abatement*; for if he were allowed to give it in evidence, upon the trial, and ſo nonſuit the plaintiff, it would be a great hindrance to juſtice: for in many caſes a creditor does not know all the partners; particularly a ſecret one. But when the defendant pleads in abatement, he muſt ſet forth in his plea the names of all his partners, and the plaintiff is thereby informed againſt whom he ought to proceed. (*n*)

With regard to ſurviving partners it is a rule, that where one of ſeveral partners dies, an action upon a partnerſhip contract muſt be brought in the name of the ſurvivors only: for the executor and the ſurvivors cannot join, becauſe the remedy ſurvives.* And in an action by or againſt a ſurviving partner, the plaintiff may declare not only for a debt contracted in the life-time of the deceaſed partner, but alſo for a debt due to or from the ſurvivor in his own right. (*o*)

(*k*) *Vide* 2 *Stra.* 820. 2 *Term Rep.* 282 3 *Term Rep.* 433. 779.
(*l*) 1 *Eſp. Rep.* 182. (*m*) *Sitt. at* Guildhall, *Trin* 4 Geo. III. *coram Lord* Mansfield, 1 *Eſp. N. P.* 117.
(*n*) 2 *Bl. Rep.* 695. 947. 5 *Bur.* 2613. *See alſo* 1 *Saund.* 291. *b. n.* 4.
* 2 *Salk.* 444. (*o*) *Vide* 2 *Term Rep* 476. 3 *Term Rep.* 433. 5 *Term Rep.* 493. 6 *Term Rep.* 582.

5. *Of the Remedy by Partners upon Contracts, &c.* Inter se.

Generally speaking, one partner has no remedy at *law* against his co-partner for any thing relating to the partnership concern, except upon an express contract or promise made between them; the only remedy being in a court of *equity*.

But money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied is proveable as a debt under the commission of the bankrupt partner, and also recoverable against the solvent partner; and if the latter be not called upon to repay the debt to the joint creditor till after the bankruptcy of the other; he may recover from the bankrupt partner his share of such debt so paid after the bankruptcy to the joint creditor, notwithstanding he may have obtained his certificate. (*p*)

So, where A. engages as a partner in a particular transaction with B., C., and D., who were before partners; B., C., and D., become bankrupts, after which A. pays a debt due from himself and them to a joint creditor; it was determined that these three partners constituted but one debtor to A., and that he might recover from B. the proportion of B., C., and D., towards the joint debt; B. not having pleaded in abatement. (*q*)

So, where A., B., and C., having dissolved partnership, C. after such dissolution, drew bills in the partnership firm in favour of D., he not knowing of such dissolution, upon which D. brought his action against all the former partners, and C. having pleaded his bankruptcy, D. entered a *nolle-prosequi* as to him, and recovered judgment against A. and B., which was afterwards satisfied by the attorney of A. and B., who advanced part, and borrowed the rest of the money on their *joint* credit: it was holden, that the sum so *paid*, in satisfaction of the judgment, might be recovered in a *joint* action by A. and B. against C. (*r*)

But where A. and B. are engaged in a partnership in insuring ships, &c., which is carried on in the name of A., and A. pays the

(*p* Wright *v.* Hunter, 1 *East Rep.* 20. (*q*) Ibid.
(*r*) Osborne *and another v.* Harper, 5 *East Rep.* 225.

whole

whole of the loſſes, Such a partnerſhip being illegal by Stat. 6 Geo. I. c. 18., A. cannot maintain an action againſt B. to recover a ſhare of the money that has been ſo paid. (*s*)

Though, if two perſons jointly engage in a ſtock-jobbing tranſaction, and incur loſſes, and employ a broker to pay the differences, and one of them, with the privity and conſent of the other, repay the broker the whole ſum, he may recover a moiety from his companion in an action for money paid to his uſe, notwithſtanding the Stat. 7 Geo. II. c. 8. (*t*)

One partner may maintain an action againſt his copartner, for money received to the ſeparate uſe of the former, and wrongfully carried to the partnerſhip account. (*v*)

But where A., B., and C., became partners in inſuring ſhips, (contrary to the Stat. 6 Geo. I. c. 18. ſ. 12.;) and it was agreed that the policies ſhould be underwritten in the name of A only, ſeveral policies were effected, and the premiums received by C. and D. as brokers: it was determined that A. could not recover thoſe premiums from C. and D. (*u*)

Where two perſons enter into articles of partnerſhip for a term of years, in which is a covenant to account *yearly*, and to adjuſt and make a final ſettlement at the expiration of the partnerſhip, and they diſſolve the partnerſhip before the term expires, and account together, and ſtrike a balance which is in favour of the plaintiff, including ſeveral *items* not connected with the partnerſhip, and the defendant promiſes to pay it, an action of *aſſumpſit* lies on ſuch expreſs promiſe. (*w*)

(*s*) Mitchell *and others v.* Cockburne, 2 *H. Bl.* 379. *See alſo* Aubert *v* Maze, 2 *Bos. and Pul* 371. *S P.* (*t*) Petrie *and another v.* Hannay, *Bart.* 3 *Term Rep* 418. *See alſo* Yaikney *v.* Reynous, 4 *Bur.* 2069.

(*v*) Smith *v.* Barrow, 2 *Term Rep* 476

(*u*) Booth *and others v.* Hodgſon *and another*, 6 *Term Rep.* 405.

(*w*) Foſter *v.* Allanſon, 2 *Term Rep.* 479. Moravia *v.* Levy, *Ib.* 483. *n. a.*

CHAPTER

CHAPTER VII.

Of Owners, Maſters, and Seamen of Merchant-Ships.

THE ſubject of this chapter may be arranged under the following heads:

1. *Of the Owner's and Maſter's Liability upon Contracts for Repairs and Neceſſaries, &c.*
2. *Of the Owner's Liability for Money borrowed by the Maſter for the Uſe of the Ship.*
3. *Of Freight.*
4. *Of Demurrage.*
5. *Of Paſſage Money.*
6. *Of Seamen's Wages:* And,

    1. *Of the Contract of hiring.*
    2. *Of the Seaman's Right to the Whole or Part of his Wages; and of the Loſs or Forfeiture thereof.*
    3. *Of the Time and Place of Payment of Wages.*
    4. *Of the Remedy for the Recovery of Wages.*

1. *Of the Owner's and Maſter's liability for Repairs and Neceſſaries, &c.*

Upon a general contract for repairs done to a ſhip, it is ſaid, (*a*) as a general rule, that the ſhipwright has his election to ſue either the maſter, who employs him, or the owners; but if the ſhipwright undertakes to do the repairs on a ſpecial promiſe from either, the others diſcharged.

So, where one of two joint owners conveys his moiety of a ſhip to his companion by a bill of ſale, which is void by the Stat. 26 Geo. III. c. 60. ſ. 17. in conſequence of ſome informality in the certificate of regiſtry not being truly recited in the bill of ſale, both the owners remain liable for repairs done to the ſhip, notwithſtanding the execution of the bill of ſale. (*b*)

So, where a ſhip was burnt by accident in the ſhipwright's dock after the repairs were nearly finiſhed, the owner was held liable for ſo much of the repairs as were actually done at the time the accident happened.

Thus, in the caſe of *Menetone* v. *Athawes*, (*c*) which was an action of *aſſumpſit* by a ſhipwright for work and labour done, and materials provided, in repairing the defendant's ſhip: and the queſtion was, "whether the plaintiff was entitled to recover under "the following circumſtances."

The ſhip, being damaged, was obliged to put back in order to be repaired; and ſhe was to have gone out of the dock on a *Sunday*: but in the interim, *viz.*, on the day before, and when only three hours' work was wanting to complete the repair, a fire happened at an adjacent brewhouſe, and was communicated to the dock, and the ſhip was burnt. It was the ſhipwright's own dock; and the owner of the ſhip had agreed to pay him 5*l.* for the uſe of it.

(*a*) Garnham v. Bennett, *Stra.* 816.
(*b*) Weſterdell v. Dale, 7 *Term Rep.* 306. (*c*) 3 *Bur.* 1592.

The

The court, after argument, determined, that the plaintiff was entitled to recover for the repairs actually done to the ſhip.

Of Neceſſaries.] When a ſhip is ſupplied with *neceſſaries* by order of the maſter, the creditor has, in general, a double ſecurity. 1. The maſter is perſonally liable, as making the contract. 2. The owners are liable, whether they know of the ſupply or not, the maſter being conſidered as acting under their direction and appointment. The owners, indeed, are liable though they happen to let the ſhip for hire to the maſter, if the creditor is wholly unacquainted with this circumſtance.

Thus, in the caſe of *Rich* v. *Coe* and others, (*d*) which was an action of *aſſumpſit* for goods ſold and delivered. *Thomas Rich*, the elder, and *Thomas Rich*, the younger, being rope-makers, did, on the 21ſt of *November*, 1772, ſupply the ſhip *Henry* and *Thomas* with cables, to the amount of 5*l.* 8*s.* 3*d.* by the order of *Thomas Harwood*, the captain; and made *Harwood*, and the owners of the ſhip (the defendants) debtors, in the uſual manner, without naming the owners, or knowing particularly who they were. The ſhip *Henry* and *Thomas*, was let by the defendants to *Harwood* upon certain articles, in which it was mutually covenanted between them as follows: 1ſt, The owners covenanted with *Harwood*, that, on his performance of the covenants ſtipulated on his part, he ſhould have the ſole management of the ſhip, and employ her for his own ſole benefit and advantage, for the ſpace of eleven years, if he ſhould ſo long live, and the ſhip ſhould not be loſt. The covenants, on the part of *Harwood*, were, to pay a yearly rent of 36*l. per annum*, at ſtated periods; that he ſhould at all times, at his own coſt and charge, repair, maintain, and keep the veſſel, and tackel, rigging, &c. in good and ſufficient repair; that he would not do or omit any thing, which might ſubject her to be taken, ſeiſed, or forfeited; with a proviſo, that in caſe the ſaid rent ſhould be in arrear for the ſpace of twenty-one days after any of the days appointed for payment; or in caſe *Harwood* ſhould die, or ſhould not, in all things, fulfil and keep all and ſingular the ſaid covenants, &c. then, it ſhould be lawful for the owners to take poſſeſſion of the ſaid ſhip. The caſe then ſtated, that neither the

(*d*) *Cowp.* 636. *See alſo* 2 *Vern.* 643. *S. P.*

plaintiff's

plaintiff's teſtator, nor his partner, had any notice of this contract at the time they furniſhed *Harwood*, the captain, with the goods. The queſtion was whether the defendants were liable to this debt.

Lord *Mansfield*, in delivering the opinion of the court, ſaid: "We have conſidered the caſe very particularly; and after the fulleſt deliberation we think it impoſſible to ſay, that the plaintiff is not entitled to recover. Whoever ſupplies a ſhip with neceſſaries, has a treble ſecurity. 1. The perſon of the maſter. 2. The ſpecific ſhip. (*e*) 3. The perſonal ſecurity of the owners, whether they know of the ſupply or not. 1. The maſter is perſonally liable as making the contract. 2. The owners are liable in conſequence of the maſter's act, becauſe they chooſe him: They run the riſk, and they ſay, whom they will truſt with the appointment and office of maſter. Suppoſe, the owners in this caſe, had delivered the value of the goods in queſtion in ſpecie to the maſter, with directions for him to pay it over to the creditors, and the maſter had embezzled the money; it would have been no concern of the creditors: for they truſt ſpecifically to the ſhip, and generally to the owners. In this caſe, the defendants are the owners; and there happens to be a private agreement between them and the maſter, by which he is to have the ſole conduct and management of the ſhip, and to keep her in repair, &c. But, how does that affect the creditors, who, it is expreſsly ſtated, were total ſtrangers to the tranſactions? And that is an anſwer to the obſervation that the plaintiff muſt have known the real ſituation of the maſter in this caſe, from the general uſuage and cuſtom of the country in that reſpect. To be ſure, if it appeared that a tradeſman had notice of ſuch a contract, and, in conſequence of it, gave credit to the captain individually as the reſponſible perſon, particular circumſtances of that ſort might afford a ground to ſay, he meant to abſolve the owners, and to look ſingly to the perſonal ſecurity of the maſter. But here it is ſtated, that the plaintiff had no notice whatever of the contract. The owners themſelves are aware of their being liable at the time. They chooſe a maſter to whom they agree to let the ſhip; and truſt for their ſecurity to the covenants which they oblige him to enter into. Theſe covenants

(*e*) *Sed Vide Abbott on Shipping* 124. *and the authorities there cited, contra.*

are

are, that he ſhall keep the ſhip in repair, and deliver her up at the end of the term in as good condition as when delivered to him. This is not all; for they indemnify themſelves againſt the private debts of the maſter, and againſt his being taken in execution: for, if he does not perform all and every the covenants in the agreement (except in caſe of the loſs of the ſhip), the conſequence, beſides their remedy againſt him upon the covenant is, that the contract and agreement is to be abſolutely at an end, and they are to take poſſeſſion of the ſhip.

Suppoſe the ſhip had been impounded in the Admiralty Court, and that had happened at the end of the term; or, ſuppoſe the captain had then broken a covenant, which had put an end to the agreement, the defendants could never have taken the ſhip out of the court, without paying the debt for which the ſhip was impounded. We are all of opinion, therefore, that under theſe circumſtances there is no colour to ſay, that the creditors ſhould be ſtript of the general ſecurity they are by law entitled to againſt the owners.

But in order to conſtitute a demand againſt the owners, it is neceſſary that the ſupplies furniſhed by the maſter's order ſhould be reaſonably fit and proper for the occaſion, or that money advanced to him for the purchaſe of them, ſhould, at the time, appear to be wanting for that purpoſe. The contrary in either caſe would furniſh a ſtrong preſumption of fraud and colluſion on the part of the creditor. (*f*)

So, wherever it appears that the credit was given ſolely to the *owner*, the *maſter* is not liable.

Thus, in the caſe of *Hoſkins* v. *Slayton*, (*g*) it appeared, that the goods were ſails made for the uſe of a ſhip; and the evidence was, that the defendant, who is the maſter of the ſhip, ordered the ſails, and that the plaintiff knew the owner of the ſhip, and before that had applied to him that he might make them.

It was objected, on behalf of the defendant, that he was not liable, and a diſtinction offered, that where the owners live upon the ſpot, they only are liable to pay for the goods delivered for the

(*f*) *Vide* 1 *Term Rep.* 77. *Abbott on Shipping*, 116. 122.
(*g*) *Cas. Temp. Hardw.* 376.

uſe

uſe of the ſhip, though ordered by the maſter; but that where the owners live abroad, there the maſter is liable as well as they.

But *Lee*, Ch. J. ſaid: "In general, if the maſter orders the goods, both are liable, the maſter who gives the orders, and upon whoſe credit the work is done, and the owners in reſpect of the work being done to their property; for if I, without having given orders, ſuffer a work to be done for me, I muſt pay for it: but though both are liable in ſuch a caſe, yet if it appears that the credit was given to the owners only, and that the maſter in giving orders acted merely as their ſervant, he will not be liable; and he directed the jury, that if, upon the evidence, they thought no credit was given to the maſter, but the owners alone, then they ſhould find for the defendant." The jury accordingly found a verdict for the defendant.

So, where an owner *ordered* goods for the uſe of his ſhip before the appointment of a maſter, it has been decided, that the maſter is not liable, though part of the goods were *delivered* after his appointment; no *perſonal* credit having been given to him. (*h*)

The mortgagee of a ſhip is not liable for neceſſaries furniſhed previous to his taking poſſeſſion of the ſhip.

Thus, in the caſe of *Jackſon* v. *Vernon*, (*i*) which was an action for goods ſold and delivered, in which a verdict was found for the plaintiff, ſubject to the opinion of the court, on the following caſe.

The plaintiff, who was a rope maker, on the 7th of *February*, 1787, and the 22d of *July*, and 1ſt of *Auguſt*, 1788, ſupplied the ſhip *Three Siſters* with cordage and ſtores, by order of one *Palmer*, the owner of her, without the knowledge of the defendant. On the 5th of *February*, 1787, *Palmer* gave a bond to the defendant of 3000*l.*; conditioned for the payment of 1500*l.*, and a warrant of attorney to confeſs a judgement thereon, which was accordingly entered as of *Hilary Term*, 1787, on the ſame day, *Palmer*

(*h*) Farmer *and another* v. Davies, 1 *Term Rep.* 108.

(*i*) 1 *H. Bl.* 114. *See alſo* Chinnery v. Blackburne, *Ibid.* 117 *n. a. et poſt, in which it was decided that a mortgagee out of poſſeſſion is not entitled to the freight, on the ground of his not being liable to the charges, Sed Vide* 7 *Term Rep.* 312. *and Abbott on Shipping*, 15 *to* 21.

executed

executed an abſolute bill of ſale of the ſhip to the defendant, in conſideration of 1500*l.* paid by the defendant; and alſo a deed of aſſignment of various articles of perſonal property, and among them a policy of inſurance on the ſhip, *towards payment and ſatisfaction of the ſum of* 1500*l. that day lent and advanced to him by the defendant*, which deed of aſſignment further recited, "That whereas to the intent and purpoſe of *better ſecuring* to the defendant, the ſaid principal ſum of 1500*l.* and the intereſt thereof, *Palmer* had by deed-poll, bearing date therewith, bargined, ſold, aſſigned, conveyed, and aſſured to the defendant, the ſaid ſhip or veſſel, &c. to hold to him, his executors, adminiſtrators, and aſſigns *abſolutely*, and the ſaid *Palmer* had likewiſe entered into a bond of equal date therewith in the ſum of 3000*l.* conditioned for the payment of 1500*l.* and intereſt, and had alſo at the ſame time executed a warrant of attorney for better ſecuring the ſame, and then that indenture further witneſſed, and it was covenanted, &c. that the ſaid ſeveral deeds and inſtruments were ſo executed by the ſaid *Palmer*, for the purpoſe of enabling the defendant, his heirs, executors or adminiſtrators, *either by public ſale, or private contract, to ſell and diſpoſe of the ſeveral matters and things, therein reſpectively comprized*, or other the effects of the ſaid *Palmer*, and thereby *to raiſe, and pay the ſaid ſum of* 1500*l. ſo lent and advanced, &c., and the intereſt thereof, without any further or other concurrence, of the ſaid* Palmer, his heirs, executors, adminiſtrators, or aſſigns, or any of them, *at any time before the ſame ſhould be paid off or diſcharged by the ſaid* Palmer, his heirs, executors, or adminiſtrators." But in this deed there was a covenant, from the defendant to *Palmer*, "That in caſe *Palmer* ſhould pay off and diſcharge the ſaid principal ſum of 1500*l.* and intereſt, &c., before the ſaid ſeveral matters and things ſhould be ſold or diſpoſed of, for the purpoſes aforeſaid, that then, and in ſuch caſe, the defendant ſhould and would reconvey, and re-aſſign, the ſaid ſeveral matters and things, thereinbefore mentioned, in ſuch manner as the ſaid *Palmer* ſhould reaſonably require. And it was thereby alſo declared and agreed, that *nothing therein contained ſhould prevent the defendant from ſelling, and abſolutely diſpoſing of all and every of the ſaid premiſes, matters, and things, thereinbefore mentioned, at any time previous to the full payment of the ſaid ſum of* 1500*l. with intereſt, &c.*" On the 30th of *July*, 1788, *Palmer* aſſigned the freight to the defendant. On the 7th of *Auguſt in the ſame year*, the defendant *took poſſeſſion* of the ſhip, and received the freight due to the owner. On the 22d of the

ſame

ſame month of *Auguſt*, the defendant ſold the ſhip, and gave an indemnity to the purchaſer, againſt all demands on her, prior to that date.

The queſtion for the opinion of the court was, Whether the defendant was liable to pay for the cordage and ſtores furniſhed by the plaintiff, ſubſequent to the bill of ſale and deed of aſſignment and defeaſance of the 6th of *February*, 1787?

Mr. Juſtice *Heath* and Mr. Juſtice *Wilſon*, who were the only judges preſent in the court, determined that the plaintiff was not entitled to recover againſt the defendant; he being out of poſſeſſion at the time the goods were furniſhed the ſhip.

Heath, J. ſaid: "As we both agree in opinion on this queſtion, and have no doubt, it would be wrong to put the parties to the expence of a ſecond argument. This is an action for goods ſold and delivered for the uſe of the ſhip *Three Siſters*, and the queſtion is, Whether the defendant be ſuch an owner as is liable for the payment? *Palmer* on the 6th of *February*, 1787, executed a bill of ſale to him, and on the ſame day another deed, reciting the bill of ſale with a defeaſance. It has been argued, that this is not a mortgage; but though it is not in the modern form, yet it is like an ancient mortgage by deed abſolute, with another deed of defeaſance; no day of payment and re-conveyance is mentioned, becauſe *Vernon* the defendant inſiſted on having a right to ſell the ſhip when he pleaſed, on account of the inſolvency of *Palmer*. From the nature therefore of the tranſaction, and the circumſtances attending theſe deeds, the aſſignment of the ſhip to the defendant was in reality a mortgage.

Then the queſtion is, Whether a mortgagee out of poſſeſſion is anſwerable for goods furniſhed for the uſe of the ſhip? Now though the owners are bound by the contracts of the captain, he being their agent, yet the mortgagee is not ſuch an owner till he has poſſeſſion. The caſe of *Rich* v. *Coe* (*k*) is only applicable to the preſent, inaſmuch as there *Harwood*, who had hired the ſhip, was not liable for neceſſaries, but was conſidered merely as the agent for the real owners. The caſes of *Eaton* v. *Jaques*, Doug.

(*k*) *Ante* 332.

455. *Walker* v. *Reeves*, Ibid. 461. and *Chinnery* v. *Blackburne*, (*l*) are in point to ſhow, that the mortgagee out of poſſeſſion is not anſwerable for the contracts of the mortgagor.

Wilſon, J. "The only queſtion is, Whether the conveyance to *Vernon* were abſolute, or only by way of ſecurity? No one, I think, who reads theſe deeds can have any doubt of its being a mere mortgage for a loan of money. Here is a bond for 3000*l.* conditioned for the payment of 1500*l.* lent by *Vernon* to *Palmer*; a warrant of attorney and judgment entered on it; then a conveyance of the ſhip by a bill of ſale, in conſideration of the ſame ſum of 1500*l.*; and as a farther ſecurity, a deed of aſſignment, with a defeaſance annexed. In this deed of aſſignment there is no covenant for a reconveyance; becauſe, as an additional ſecurity, *Vernon*, the defendant, ſtipulated for a power to ſell the ſhip at any time, without further leave from *Palmer*. It was underſtood by *Palmer* to be merely a pledge for the money due, as he contracted for freight, after the conveyance to *Vernon*; for if that conveyance had been abſolute, he could not properly make a contract for freight. On the 7th of *Auguſt*, *Vernon* takes poſſeſſion, till which time *Palmer* was the poſſeſſor, ſubject to *Vernon*'s claim, who was not liable till he had actual poſſeſſion. The owners of a ſhip are liable for furniture and neceſſaries, becauſe they receive the immediate benefit of the freight; and it is for that reaſon the contracts of the captain are binding upon them, he being their agent or ſervant. But the caſes which have eſtabliſhed this to be law, do not affect a mortgagee not in poſſeſſion, who cannot be conſidered as an owner, nor as ſuch entitled to the freight. The caſe of *Chinnery* v. *Blackburne* was decided on the ground, that as a mortgagee out of poſſeſſion was not liable to the charges of the ſhip, ſo he was not entitled to the freight."

If one of ſeveral part-owners contracts for neceſſaries for the uſe of the ſhip, all of them are jointly liable to be ſued for the price thereof. (*m*) If, however, the perſon who gives credit on ſuch an occaſion, does not at the time know that there were other part-owners, he may ſue him alone from whom he received the orders. (*n*)

(*l*) *Poſt* 361. (*m*) *Wright* v. *Hunter*, 1 *Eaſt Rep.* 20.
(*n*) Doo v. *Chippenden*, *Cor.* Lord Kenyon, *Sitt. after.* Hil. T. 1790. *upon a plea in Abatement.* *Abbott.* 84.

2. *Of the Owner's Liability for Money borrowed by the Maſter for the Uſe of the Ship.*

The owner is liable for money borrowed by the captain *abroad* for the *neceſſary uſe of the ſhip*.

Thus, in the caſe of *Evans* v. *Williams*, (*o*) which was tried before Lord *Kenyon*, at *Guildhall*, where the maſter of a ſhip had borrowed money abroad for the uſe of the ſhip. His Lordſhip held that the lender might recover againſt the owners the money laid out upon the ſhip; and this opinion was afterwards confirmed by the Court of *King's Bench*. It was proved at the trial that the maſter could not obtain money on the ſecurity of the ſhip alone, which, in the event that happened, would have been more beneficial to the owners, becauſe the ſhip periſhed on the voyage home.

So, in the caſe of *Cary* v. *White*, (*p*) in which a claim was made upon the owner for money advanced to the maſter *abroad*, in the courſe of a foreign voyage, and which underwent a great deal of diſcuſſion, and ſeems worthy of particular notice. Sir *Humphrey Jervis*, who lived at *Dublin*, being ſole owner of a ſhip lying at *Briſtol*, under the command of *S. Symons*, and originally intended to be freighted from thence to *Ireland*, being diſappointed in that voyage, and informed by *Symons* that a freight could be got for the *Weſt Indies*, if he approved of it, wrote to *Symons* to accept ſuch freight, and to take up as much money upon bottomry as would fit out the ſhip, and provide a ſtock for port-charges. *Symons* thereupon entered into a charter-party with *Cary*, a merchant, at *Briſtol*, for the hire of the ſhip for a voyage to the *Weſt Indies*, and back to *Briſtol*; and by the terms of the charter-party the owner was to pay the ſeamen's wages, and provide all neceſſaries for the ſhip; but *Symons*, not being in caſh for this purpoſe, borrowed 200*l.* upon bottomry of *Cary*, and alſo obtained a letter of credit from him to his correſpondents in *Jamaica*, for whatever money he might further want, either to repair the ſhip, or furniſh her with proviſions, or to pay the ſeamen's wages. The ſhip proceeded to *Jamaica*,

(*o*) *Sitt. aft. Trin. T.* 28 *Geo.* III. *Abbott.* 117.
(*p*) 5 *Bro. P. C.* 325. *oct. ed. Abbott.* 116.

and there *Symons*, the maſter, by virtue of *Cary*'s letter of credit, took up ſeveral ſums, amounting to 789*l.* On the return from *Jamaica* to *Briſtol* the ſhip was loſt. Sir *Humphrey Jervis* refuſed to pay *Cary* the 789*l.* and *Cary* thereupon ſued him for the recovery of it in the Court of *Chancery*, in *Ireland*, alleging that the money was expended in repairs and other neceſſary purpoſes; and he dying during the ſuit, the proceedings were revived, and carried on againſt his adminiſtrators. The *Lord Chancellor* of *Ireland*, aſſiſted by one of the Chief Juſtices, and another Judge, at firſt decreed that *Cary* ſhould recover ſo much of the money claimed, as, upon a trial at law, ſhould be found to have been thus expended; but the cauſe was afterwards reheard, and the Court declared that *Cary* was not entitled to any relief. Upon this *Cary* appealed to the *Britiſh Houſe of Lords*, before whom the cauſe was heard. On behalf of *Cary* it was argued, "That, at common-law, whatever is done by a ſervant, which is for the benefit of his maſter, and within the truſt and duty of his place, binds the maſter as if done by himſelf; and in a voyage, the maſter of a ſhip is the owner's ſervant, whoſe duty requires him to provide neceſſaries for the ſhip, it being the owner's intereſt that they ſhould be provided; ſo that whatever the maſter neceſſarily takes up and employs for that purpoſe, the owner is bound to pay: and that by the cuſtom of merchants, if the maſter be ſupplied with neceſſaries for the ſhip by the order or credit of any freighter, the owner is liable to pay ſuch freighter, and on that ground it is cuſtomary for freighters to furniſh maſters of the ſhips they take to freight with letters of credit for whatever money they may happen to want for the neceſſary ſervice of the ſhip."

On the other ſide it was contended, "That it would be of a moſt dangerous conſequence for the maſter of a ſhip to charge the perſon or eſtate of his owner with what money he ſhould take up, on pretence of providing for the ſhip, without an expreſs power or authority for that purpoſe; for that the law of merchants had never carried it further than to inveſt the maſter with a power of mortgaging, or charging the ſhip, or cargo, with ſuch money; that, in the preſent caſe the money could not be laid out by the appellant or his factors, upon the credit of Sir *Humphrey Jarvis*, not only becauſe he was a total ſtranger to them, but principally becauſe he had, for two years before, failed in his circumſtances, and loſt his credit; nor was it even

"pretended

" pretended that Sir *Humphrey* ever gave any authority to the " maſter to take up money otherwiſe than on bottomry: that if " Sir *Humphrey*'s perſon or eſtate was in all events liable to make " good this 789*l.*, beſides the 200*l.* advanced on the bottomry " bond, and which, in caſe the ſhip had returned ſafe to *Briſtol*, " he would have been anſwerable for, he muſt of neceſſity have " been a very great loſer, as the ſhip coſt at firſt but 700*l.*, and her " freight in that event would not have brought above 600*l.*; and " therefore, if Sir *Humphrey* himſelf had been at *Jamaica*, he " never would have conſented to take up money for preſerving " that which would have been ſo much to his loſs: and that the " appellant's intereſt in the ſhip, by having 200*l.* on bottomry " at a large intereſt, to be paid on her return, was much greater " than Sir *Humphrey*'s; and therefore whatever money was laid " out in *Jamaica*, ought to be conſidered as laid out on the ac- " count of the appellant, but yet to be diſcounted out of the ſhip " and freight, ſo far as it would extend, on its return." The Houſe of Lords thought the owner perſonally reſponſible, if the allegations of *Cary*, as to the neceſſity of the expenditure, were true; and directed a trial by jury in the Court of Common Pleas, in *Ireland*, to aſcertain whether any, and what ſums of money were neceſſarily laid out by, or by the order of, *Cary* for the payment of ſeamen's wages, proviſions, or otherwiſe for the neceſſary repairs and uſe of the ſhip during the voyage; and decreed thoſe ſums to be paid to *Cary*, and directed the Lord Chancellor of *Ireland* to order the neceſſary ſteps for the trial of the cauſe. The cauſe was accordingly tried at the bar of the Court of Common Pleas in *Ireland*, and the jury declared by their verdict that nothing had been neceſſarily expended for theſe purpoſes by, or by the order of, *Cary*. *Cary* applied to the Lord Chancellor, who ordered a ſecond trial, and the cauſe was again tried at the bar of the Court of Common Pleas in *Ireland*, before another jury, who gave the ſame verdict; and the Lord Chancellor thereupon diſmiſſed *Cary*'s ſuit, with coſts from the time of the judgment of the Houſe of Lords. Upon this *Cary* again appealed to the Houſe of Lords; but no perſon appearing before the Houſe to ſupport his appeal, at the day appointed, the Houſe diſmiſſed it with coſts.

3. *Of Freight.*

The contract for the conveyance of merchandize is, in its nature, an entire contract; and unleſs it be completely performed by the delivery of the goods at the place of deſtination, the merchant will, in general, derive no benefit from the time and labour expended in a partial conveyance, and, conſequently, be ſubject to no payment whatever, although the ſhip may have been hired by the month or week. (*q*) The caſes in which a partial payment may be claimed, are exceptions to the general rule, founded upon principles of equity and juſtice, as applicable to particular circumſtances. On the other hand, an interruption of the regular courſe of the voyage happening, without the fault of the owner, does not deprive him of his freight, if the ſhip afterwards proceed with the cargo to the place of deſtination, as in the caſe of capture and recapture. (*r*) In ſuch a caſe, however, there will be a deduction for ſalvage: and if the ſhip were hired by the week or month, it may be doubted whether the merchant be chargeable for the period of detention. (*s*) But although the delivery of goods at the place of deſtination is, in general, neceſſary to entitle the owner to the freight, yet with reſpect to living animals, whether men or cattle, which may frequently die during the voyage, without any fault or neglect of the perſons belonging to the ſhip, it is ſaid, (*t*) that if there be no expreſs agreement whether the freight is to be paid for the lading, or for the *tranſporting* them, freight ſhall be paid as well for the dead as for the living; if the agreement be to pay freight for the lading them, their death certainly cannot deprive the owners of the freight: but if the agreement be to pay freight for *tranſporting* them, then no freight is due for thoſe that die on the voyage, becauſe, as to them, the contract is not performed. Theſe diſtinctions are found in the civil law, and adopted by all the writers on this ſubject. (*u*) In this country it is alſo ſaid (*v*) to be not unuſual to pay for goods ſhipped for the *Eaſt* or *Weſt Indies*, at the time of the ſhipment. But this payment, although commonly called freight, is not ſtrictly or properly ſo

(*q*) *Abbott.* 254. (*r*) 3 *Rob. Ad. Rep.* 101. 1 *Bos. and Pul.* 637. 3 *Bos. and Pul.* 420. 431. *Abbott.* 255. (*s*) 3 *Bos. and Pul.* 405. (*t*) *Molloy, bk.* 2. *ch.* 4. *ſect.* 8. (*u*) *Abbott.* 256. (*v*) *Ibid.*

denominated;

denominated; that word denoting the price rather of actual carriage, than of receiving goods in order to be carried: and therefore, in a cafe (*w*) before the Court of *Common Pleas*, the Court, admitting that an action might be brought for money agreed to be paid for receiving goods on ſhip-board, in order to be tranſported, decided that ſuch money could not be ſued for or recovered by the name of *freight*. If a pregnant woman be delivered during the voyage, no freight is due for the infant. (*x*)

When goods are ſent in a general ſhip, the amount of the freight is either ſettled by the agreement of the parties, or by the uſage of the trade. In the cafe of a charter-party, if the ſtipulated payment be a groſs ſum for an entire ſhip, or an entire part of a ſhip, for the whole voyage, the groſs ſum will be payable, although the merchant have not fully laden the ſhip (*y*) And if a certain ſum be ſtipulated for every ton, or other portion of the ſhip's capacity, for the whole voyage, the payment muſt be according to the number of tons, &c. which the ſhip is proved capable of containing, without regard to the quantity actually put on board by the merchant. (*z*) On the other hand, if the merchant has ſtipulated to pay a certain ſum *per* caſk, or bale of goods, the payment muſt be, in the firſt place, according to the number of the caſks, or bales ſhipped and delivered; and if he has further covenanted to furniſh a complete lading, or a ſpecific number of caſks, or bales, and failed to do ſo, he muſt make good the loſs which the owners have ſuſtained by his failure, to be ſettled, in cafe of diſagreement, by a jury, who will take all the circumſtances into their conſideration. (*a*) Where a ſhip hired to go beyond ſea, to fetch home a cargo, for which a certain rate *per ton* was to be paid, nothing being payable for the outward voyage, was forced to return in ballaſt, the merchant's factor having no goods to put on board, the Court of *Chancery* decreed payment of the freight. (*b*)

If an entire ſhip be hired, and the burthen thereof expreſſed in the charter-party, and the merchant covenant to pay a certain ſum for every ton, ~~and~~ &c. of goods which he ſhall lade on board, but do

(*w*) Blakey *v.* Dickſon. 2 *Bos. and Pul.* 321.
(*x*) *Molloy, bk.* 2. *ch.* 4. *ſect.* 8. (*y*) *Abbott.* 256. (*z*) *Ibid.* 257.
(*a*) *Abbott.* 257. (*b*) Weſtland *v.* Robinſon, *cited in* 2 *Vern.* 212. *Abbott* 257.

not covenant to furniſh a complete lading, the owners can only demand payment for the quantity of goods actually ſhipped.(*c*)

The owner is entitled to freight on goods delivered to and received by the merchant at the place of deſtination, though they happen to be greatly damaged by a peril of the ſea; and the owner in ſuch caſe is not anſwerable for the expence incurred in endeavouring to remove the injury occaſioned by the ſalt water. (*d*)

So, in the caſe of *Lutwidge* v. *Grey*, (*e*) the merchant was held liable to pay the freight of tobacco, ſaved from ſhipwreck, and accepted by him, although part was ſo much damaged as to be of no value.

It appears doubtful whether the merchant, in the caſes juſt cited, was bound to receive the goods thus damaged, or whether he was not at liberty to abandon them when brought to the place of deſtination, and by ſo doing to have diſcharged himſelf from the freight. It is obſerved, (*f*) that, upon this queſtion, different doctrines and opinions have prevailed, and there is no judicial deciſion in our books: although in ſome caſes between the merchant and his inſurer it has been admitted that the freight was payable, notwithſtanding the goods were ſo much damaged that their value fell ſhort of its amount. But it is neceſſary to diſtinguiſh the cauſes from which the deterioration may have proceeded. If it had proceeded from the fault of the maſter or mariners, the merchant is entitled to receive a compenſation, and, of courſe, he is not anſwerable for the freight, except by way of deduction from the amount of the compenſation. On the other hand, if it have proceeded from an intrinſic principle of decay naturally inherent in the commodity itſelf, whether active in every ſituation, or only in the confinement and cloſeneſs of a ſhip, the merchant muſt bear the loſs, and pay the freight; for the maſter and owners are in no fault, nor does their contract contain any inſurance or warranty againſt ſuch an event.

(*c*) *Lady James* v. *Eaſt India Company, Sit. at Guildhall, after Mich. Term* 1789. *Coram Lord Kenyon. Abbott*, 257.
(*d*) *Hotham* v *Eaſt India Company, Doug.* 272.
(*e*) *Determined in the Houſe of Lords*, 13 *Feb.* 1733. *Vide poſt.* 347.
(*f*) *Abbott* 264 to 275. *And ſee the ſeveral authorities there quoted.*

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In our *Weſt India* trade, the freight of ſugar and molaſſes, is ſaid, (*g*) to be regulated by the weight of the caſks at the port of delivery here, which, in fact, is in every inſtance leſs than the weight at the time of the ſhipment; and therefore the loſs of freight occaſioned by the leakage, neceſſarily falls upon the owners of the ſhip by the nature of the contract.

If, upon an agreement between the owner and merchant, that the ſhip ſhall ſail to a particular port abroad, and there receive and load a full and complete cargo of goods, the ſhip ſails, and arrives, and is ready to receive her cargo, but the merchant is prevented from loading her in conſequence of a prohibition to export goods, the owner, notwithſtanding ſuch prohibition, is entitled to the amount of the freight.

Thus, in the caſe of *Blight* and others *v. Page*, (*h*) which was an action upon a memorandum for a charter-party: and by the memorandum it was agreed between the plaintiffs, who were owners of the ſhip *Favourite*, and the defendant, that the ſhip, being tight, &c. ſhould with all convenient ſpeed ſail and proceed to *Liebau*, or ſo near thereto as ſhe could ſafely get, and there load, from the factors of the defendant, a full and complete cargo of *barley*, in bulk not exceeding what the ſaid ſhip could reaſonably ſtow and carry over and above her tackle, &c.; and being ſo loaded, ſhould therewith proceed to *Berwick*, or ſo near thereto as ſhe could ſafely get, and deliver the ſame, on being paid freight at and after the rate of 8*s.* 6*d.* *per* quarter, with two-thirds port charges, and pilotage as cuſtomary, (reſtraints of princes and rulers during the ſaid voyage always excepted,) one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in two months following. Thirty running days to be allowed the ſaid merchant, if the ſhip was not ſooner diſpatched, for loading the ſaid ſhip at *Liebau*, and unloading at *Berwick*, and ten days on demurrage, over and above the ſaid laying days, at 3*l.* per day.

The *Favourite* ſailed on her voyage, and proceeded to *Liebau*; but immediately on her arrival in the roads of that place, the cap-

(*g*) *Abbott.* 269. (*h*) Sittings at Guildhall *after Mich. T.* 1801. coram *Lord Kenyon, cited in* 3 *Bos. and Pul.* 295. *n. a.*

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tain was informed by the factors of the defendant, that the *Ruſſian* Government had prohibited the exportation of *barley*, and that it was therefore out of their power to furniſh the intended cargo. The captain, however, entered the port of *Liebau*, and after continuing there forty-nine days, returned in ballaſt to *Berwick*.

The action was brought to recover 459*l.* for freight, 27*l.* 18*s.* for charges, and 30*l.* for ten days demurrage.

In ſupport of the action it was argued, by the plaintiff's counſel, that the exception of the reſtraints of rulers and princes was only applicable to the owners, and did not therefore excuſe the ſhippers.

For the defendant it was urged, 1ſt, that the exception was applicable both to owners and ſhippers: and 2d, that as the prohibition of the *Ruſſian* Government equally prevented the captain from ſailing with the cargo, as the ſhippers from loading it on board, the averment in the declaration that the plaintiffs were ready to perform their part of the contract, was not true; and, 3dly, that there was no pretence for demanding demurrage, ſince it was the fault of the captain himſelf to remain at *Liebau* after the notice which he had received.

Lord *Kenyon*, Ch. J. ſaid, "I am decidedly againſt the defendant upon the point of law. It is ſaid in Co. Litt. 209. that if a man be bound in an obligation to A, conditioned to enfeoff B., a ſtranger, and B. refuſe, the obligation is forfeited; for the obligor has taken upon him to make the feoffment. The reaſon of this is clear: if a man undertakes what he cannot perform, he ſhall anſwer for it to the perſon with whom he undertakes. I am always deſirous to apply the ſettled principles of the law to the regulation of commercial dealings. With reſpect to the charge for demurrage, as it appears that notice was given before the captain entered the port that the factor could not furniſh a cargo, there is no pretence for making the plaintiffs liable."

A verdict was accordingly entered for the plaintiffs for 486*l.* 18*s.* for the freight and charges only.

But, if a *Britiſh* merchant charter a *Swediſh* ſhip, on a voyage to *St. Michael's*, for a cargo of fruit, and the charter-party contain the uſual exception againſt the reſtraint of princes, and the ſhip be prevented from reaching *St. Michael's* within the fruit ſeaſon, by an embargo laid on *Swediſh* veſſels by the *Britiſh* Government, the

the *Swedish* owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himself to recover the freight against the *British* merchant. (*i*)

1. *Of the Apportionment of Freight.*] An apportionment of freight is usually made in two instances, *first*, when the ship has performed the whole voyage, but has brought a part only of the merchant's goods in safety to the place of destination: and, *secondly*, when the ship has not performed the whole voyage, but the master has delivered the goods to the merchant at a place short of the port of destination. (*k*)

When the ship, by reason of any disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage, the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight: but if he is unable, or if he declines to do this, and the goods are there received by the merchant, the general rule of the maritime law is, that freight shall be paid according to the proportion of the voyage performed, *pro ratâ itineris peracti.* (*l*)

In the case of *Lutwidge* v. *Grey*, (*m*) it appeared that *Lutwidge*, the owner of a ship called the *Wharton*, of *Whitehaven*, let his ship by a charter-party to *Archibald Grey*, and others, merchants at *Glasgow*, for a voyage from *Glasgow* to *Maryland* or *Virginia*, and back from thence to *Glasgow*, and was to receive freight from them for the homeward cargo only, at the rate of 8*l.* 12*s.* *per* ton of tobacco, computing four hogsheads to the ton; one half to be paid immediately after the ship's discharge at *Glasgow*, and the other half within six months after such discharge. The ship sailed to *Virginia*, and there delivered her outward cargo, and took on board, from the merchant's factor, a cargo of tobacco, consisting of 199 hogsheads, part of which was their property; the residue belonged to other persons, and was put on board by the factor to complete the lading, in pursuance of directions given to him for that purpose by his principals, in case the outward cargo should not enable him to purchase a full lading on their

(*i*) Touteng *and another* v. Hubbard, 3 *Bos. and Pul* 291.
(*k*) *Abbott.* 274. (*l*) Ibid 276. (*m*) *Determined in the House of Lords, 23d Feb.* 1733. *Abbott.* 280. *This case is also cited in* Luke v. Lyde, 2 Bur. 882. *and* 1 *Bl. Rep.* 190.

account.

account. *Grey* and Co. inſured their part of the cargo wh pe. ſons living at *Briſtol*; the other part was not inſured. On the return homeward, the ſhip was unfortunately caſt away at *Yough all*, in *Ireland*, which is within a very ſhort diſtance of *Glaſgow*, and part of the cargo, to the amount of 163 hogſheads, was ſaved by the aſſiſtance of the officers of the cuſtoms at *Youghall*, and depoſited in the cuſtom-houſe there. *Lutwidge*, the owner, as ſoon as he knew of the misfortune, informed *Grey* and Co. of it, and told them he ſhould provide another ſhip to tranſport the tobacco which was ſaved. *Grey* and Co. abandoned their part of the cargo to their inſurers, and indorſed over the bills of lading to them. *Lutwidge* provided another ſhip at *Youghall*, but the inſurers took the part of the cargo abandoned to them, and conveyed it to *Briſtol*. The agent of the proprietors of the other part of the cargo was willing to have laded it on board the ſhip thus provided, if the maſter thereof would ſign bills of lading to deliver it at *Glaſgow*, in conformity with the original charter-party; but the maſter refuſed to give ſuch bills of lading, or to oblige himſelf to deliver it at *Glaſgow*, offering only to give receipts, obliging himſelf to deliver it in *Great Britain*. And the agent ſuſpecting that he meant to take it to *Whitehaven*, and not to *Glaſgow*, refuſed to deliver it to him upon thoſe terms, and ſent it by another veſſel to *Glaſgow*, where ſeveral hogſheads were found ſo much damaged, that they were not entered at the cuſtom-houſe, but burned at the king's ſcales there. *Lutwidge* brought an action againſt *Grey* and others, for his freight according to the charter-party, in the Court of *Admiralty* in *Scotland*. On their part it was inſiſted that the contract of affreightment was diſſolved by the ſhipwreck, and that there remained only a demand in equity for freight; that the demand could not be made againſt them, who had not taken the goods into their poſſeſſion, but muſt be made for part againſt the inſurers at *Briſtol*, and for the reſidue againſt the proprietors of that reſidue: that this demand could only be in proportion to the value of the goods ſaved, after deduction of ſalvage and charges; and that at all events it could only be for the proportion of the voyage to *Youghall*, becauſe the maſter of the ſhip refuſed to ſign bills of lading, and engage to deliver the tobacco at *Glaſgow*. The Judge of the Court of *Admiralty* decreed, that the full freight was due from *Grey* and Co. for the part of the cargo ſaved, but none for the part loſt, and that the full freight was due, although the goods were not carried to *Glaſgow*, becauſe *Lutwidge* had another

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ſhip ready to tranſport them thither, and there was no occaſion for any new bills of lading, while the former bills of lading ſubſiſted. From this judgment *Grey* and Co. appealed to the *Lords of Seſſion* in *Scotland*, who, by their interlocutor decreed, "That the contract of affreightment was diſſolved by the total loſs of the "ſhip, albeit ſome of the ſhipwreck goods were ſaved out of the "ſhipwreck; and found that the freighters indorſing the bills of "lading to the inſurers did not ſubject the freighters to any "freight for the goods recovered by the inſurers, but found the "merchants liable to the freight *pro ratâ itineris* of ſuch of the "goods as were brought to *Glaſgow*, notwithſtanding ſome of the "tobacco was found damnified, and burned there." This decree, or interlocutor, was, upon the petition of *Lutwidge*, reviewed by the Lords of the Seſſion, but affirmed by them. Hereupon *Lutwidge* appealed to the higheſt tribunal of the country, The *Britiſh Houſe of Lords*: the Houſe of Lords "Reverſed the decree or interlocutor of the Lords of Seſſion, com"plained of by the appellant, and the affirmance of that inter"locutor: and declared, that the reſpondents, *Grey* and others, "were liable for the full freight of ſuch of the goods as were "given up to the inſurers, and for the freight *pro ratâ itineris* of "ſuch of the goods as were brought to *Glaſgow*, notwithſtanding ſome of the tobacco were found damnified, and burned "there."

So, in the caſe of *Luke* and another *v. Lyde* (*n*) which was an action of *aſſumpſit* (*o*) for the freight of goods carried in the plaintiff's ſhip by ſea, without mentioning from or to what place. The facts of the caſe were theſe: *Lyde* ſhipped a cargo of 1501 quintals of fiſh, at *Newfoundland*, on board the ſhip *Sarah*, belonging to *Luke* and others, to be carried to *Liſbon*: the freight was to be at the rate of *two ſhillings* per quintal. The price of the cargo at *Newfoundland* was *ten ſhillings and ſixpence* per quintal. *Luke* and others alſo had on board a quantity of fiſh, their own property. The ſhip ſet ſail on the 27th of *November* 1756, and having proceeded ſeventeen days on her voyage, was taken on the 14th of *December* by a *French* ſhip, within four days ſail of *Liſbon*, but retaken

(*n*) 2 *Burr* 882. 1 *Bl. Rep.* 190. *S. C. Allott.* 281. (*o*) *The form of action, though not mentioned in the report, is aſcertained to be as here mentioned. Vide Allott.* 290.

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on the 17th of *December* by an *Engliſh* privateer, and brought, on the 29th, into the port of *Biddeford*, in *Devonſhire*. The *French* ſhip took out the maſter and all the crew, except one man and a boy. *Lyde* took his goods of the recaptors, and paid *five ſhillings* per quintal ſalvage, the value of the fiſh being then eſtimated at ten ſhillings per quintal. The fiſh could not be ſold at all at *Biddeford*, nor at any other port in *England*, for more than ten ſhillings per quintal, clear of charges and expences; and it was ſuppoſed by every perſon that the fiſh would be diſpoſed of to the greateſt advantage at *Bilboa* in *Spain*, to which place *Lyde* ſent it without delay; but it fetched there only five ſhillings and ſixpence per quintal, clear of freight and expences, being little more than one third of the prime coſt and ſalvage. The freight from *Biddeford* to *Liſbon* was higher than from *Newfoundland* to *Liſbon*. The owners, *Luke* and others, abandoned the ſhip to their inſurers, and never offered to convey the goods to *Liſbon*, nor were ever required to do ſo by *Lyde* the merchant. The Court decided, that the plaintiffs ſhould recover freight, as for half the quantity of the cargo ſhipped, conſidering the other half to be abſolutely loſt by the expence of ſalvage, and in the proportion of *ſeventeen* days, during which the ſhip had proceeded on the voyage, to *twenty-one* days, within which the voyage would have been completed, if the capture had not happened, that is, 60*l.* 14*s.* being $\frac{17}{21}$ of 75*l.*, the half of 150*l.* And Lord *Mansfield* ſaid, "If a freighted ſhip becomes accidentally diſabled on its voyage, without the fault of the maſter, the maſter has his option of two things: either to refit it, (if that can be done within convenient time,) or to hire another ſhip to carry the goods to the port of delivery. If the merchant diſagrees to this, and will not let him do ſo, the maſter will be entitled to the whole freight of the full voyage; and ſo it was determined in the Houſe of Lords, in the caſe *Lutwidge* againſt *Grey*. As to the value of the goods, it is nothing to the maſter of the ſhip whether the goods are ſpoiled or not, provided the freighter takes them: it is enough if the maſter has carried them; for by doing ſo he has earned his freight; and the merchant ſhall be obliged to take all that are ſaved, or none: he ſhall not take ſome and abandon the reſt, and ſo pick and chuſe what he likes, taking that which is not damaged, and leaving that which is ſpoiled or damaged. If he abandons all, he is excuſed freight: and he may abandon all, though they are not all loſt. (I call the freighter the merchant, and the other the maſter, for the clearer diſtinction.)

Now

Now here is a capture without any fault of the master, and then a recapture; the merchant does not abandon but takes the goods, and does not require the master to carry them to *Lisbon*, the port of delivery. Indeed, the master could not carry them in the same ship, for it was disabled, and was itself abandoned to the insurers of it; and he would not desire to find another, because the freight was higher from *Biddeford* to *Lisbon* than from *Newfoundland* to *Lisbon*. There can be no doubt but that some freight is due; for the goods were not abandoned by the freighter, but received by him of the re-captor. The question will be, What freight? The answer is, a rateable freight; i. e. *pro ratâ itineris*.

"If the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire him to do so, the master is still entitled to a proportion *pro ratâ*, of the former part of the voyage. I take the proportion of the salvage here to be half of the whole cargo upon the state of the case, as here agreed upon: and it is reasonable that the half here paid to the re-captor should be considered as lost. For the re-captor was not obliged to agree to a valuation, but he might have had the goods actually sold, if he had so pleased, and taken half the produce; and therefore the half of them are as much lost as if they remained in the enemy's hands. So that half of the goods must be considered as lost, and half as saved. Here the master had come *seventy* days of his voyage, and was within four days of the destined port when the accident happened. Therefore he ought to be paid his freight for $\frac{17}{21}$ parts of the full voyage, for that half of the cargo which was saved."

His Lordship, after citing most of the authorities on this subject, concluded thus: "It is quite immaterial what the merchant made of the goods afterwards; for the master hath nothing at all to do with the goodness or badness of the market; nor indeed can that be properly known till after the freight is paid; for the master is not bound to deliver the goods till after he is paid his freight. No sort of notice was taken of that matter in the case of *Lutwidge* and *Grey*, in the House of Lords; and yet there the tobacco was damaged very greatly, even so much that a great part of it was at the scales at *Glasgow*."

So,

So, in the caſe of *Baillie* v. *Mondigliani*, (*p*) where it appeared that a ſhip ſailed with goods from *Nevis* for *Briſtol*, but on the voyaye was taken, and carried into *France*, and condemned there. On appeal, the ſentence of condemnation was reverſed, and reſtitution awarded, but before that time the ſhip and cargo were ſold. The merchants received the price of the goods, and paid freight to the maſter *pro ratâ itineris*: and having cauſed the goods to be inſured before the commencement of the voyage, brought an action againſt the inſurers to recover from them the freight ſo paid to the maſter. The court held, that this payment could not be recovered upon this inſurance. But Lord *Manſfield* ſaid, "As between the owners of the ſhip and cargo, in caſe of a total loſs, no freight is due; but, as between them, no loſs is total, where part of the property is ſaved, and the merchant takes it to his own uſe. In this caſe the value of the goods was reſtored in money, which is the ſame as the goods, *and therefore freight was certainly due pro ratâ itineris.*"

But, in the caſe of a *Swediſh* ſhip, (*q*) which, being chartered to go from *Plymouth* to *Radſtow*, (a very ſmall diſtance,) there to take a cargo of pilchards for *Venice*, failed to *Radſtow*, and took in the cargo, and proceeded a few days on the voyage; but, meeting with bad weather, and becoming leaky, returned to *Falmouth*, and was there ſtopped by an embargo impoſed on the veſſels of *Sweden*, in conſequence whereof the cargo was taken out and reſtored to the merchants, who were *Britiſh* ſubjects; the learned Judge of the Court of Admiralty decreed, that no freight was due, but held that if any expences had been incurred by the ſhip on account of the cargo, they muſt be paid.

In the caſe of *Cock* v. *Jennings*, (*r*) which was an action of *covenant* on a charter-party of affreightment dated 2d of *Auguſt*, 1796, by which the plaintiff let his ſhip, the *Reſolution*, to the defendant to freight, from *Liverpool* to *Wyburgh*, and back to *Liverpool*, and agreed that the maſter ſhould take on board a cargo of ſalt to *Wyburgh*, and after delivering the ſame there, ſhould take on board there a cargo of deals; in conſideration of which the de-

(*p*) *Park on Inſurance, Chap.* 2. *Abbott.* 288. (*q*) *The Copenhagen Mening*, 1 *Rob. Ad. Rep.* 289 *See alſo Abbott.* 289. *S. C.*
(*r*) 7 *Term Rep.* 381.

fendant

fendant agreed to pay to the plaintiff, "in full for the freight and "hire of the ſhip for the ſaid voyage, at and after the rate of 7*l.* "*per* ſtandard hundred for deals delivered at *Liverpool*, &c. the "freight to be paid one-fourth in caſh on her arrival, and the "remainder by an acceptance on *London* at four months' date." The plaintiff in ſupport of his action alledged, that the ſhip, after carrying the cargo of ſalt to *Wyburgh*, took on board there a cargo of deals, &c. and proceeded on her voyage for and towards *Liverpool*, &c.; and whilſt the ſhip was ſo proceeding, and after ſhe had performed a great part of her voyage, but before her arrival at *Liverpool*, the ſhip was, by the force and violence of the winds and waves, wrecked and caſt upon the ſhore, and thereby became incapable of proceeding any further on the voyage, by reaſon whereof it became neceſſary to put the cargo of deals on ſhore for the preſervation thereof; "which ſaid cargo ſo unladed "the defendant accepted and received into his hands and poſſeſ- "ſion, and ſold and diſpoſed of the ſame to his own uſe, "whereby he became liable to pay to the plaintiff a proportion- "able part of the ſaid freight and hire of the ſhip for the carriage "of the ſaid cargo of deals, for ſuch part of the voyage from "*Wyburgh* to *Liverpool* as the ſhip performed;" which proportionable part amounted to the ſum of 800*l.*; and for the recovery of that ſum the action was brought.

Theſe facts were admitted to be true, and it was admitted that no part of the cargo was conveyed to *Liverpool*. The plaintiff did not pretend that he had offered to convey the deals thither, nor did the defendant aſſert that he had required him to do ſo. The Court of *King's Bench* decided, that the plaintiff could recover nothing in the preſent action. Lord *Kenyon*, Ch. J. ſaid, "We are called upon to decide in this action according to the rules of law, on a contract between theſe parties, which was made in the moſt ſolemn manner by a deed under ſeal; though, indeed, I do not know that it would have made any difference, if the queſtion had ariſen on a preciſe formal contract not under ſeal. By the terms of this agreement the defendant engaged to pay ſo much on delivery of the goods at *Liverpool*, one-fourth in caſh on her arrival, and the remainder by an acceptance at four months: but the goods never arrived; then at what time were thoſe bills to be dated? We do not ſit here to make, but to enforce contracts: and the queſtion put to us is, whether the freight is to be paid under this contract, though the ſhip never arrived, but was loſt

before her arrival at *Liverpool*? Upon which I cannot bring my mind to doubt. The caſe of *Luke* v. *Lyde* is very diſtinguiſhable from the preſent, that being the caſe of a *general aſſumpſit* for the freight of goods, in which Lord *Mansfield* ſtates the marine law on this ſubject. But what has the caſe of an implied contract to do with an expreſs contract? Lord *Coke* ſays, *expreſſum facit ceſſare tacitum.* Here the parties are bound by a preciſe agreement. Then it is ſuggeſted, that we ought not to give effect to this contract, becauſe it is unreaſonable: but we are to decide according to the contract of the parti s; and the law ſays, that if A. covenant to enfeoff B. A. is not releaſed from his covenant, though B. will not accept livery of ſeiſen, unleſs the act be fruſtrated by the act of the covenantee. It is not neceſſary now to determine whether or not the plaintiff might not have brought an action of *aſſumpſit*; it will be time enough to decide that caſe whenever the queſtion ariſes. But here the queſtion is, whether or not he can enforce payment of the money under this contract, not having carried the goods to *Liverpool*, and the defendant having only undertaken to pay on their delivery at *Liverpool*; in anſwer to this action the defendant has a right to ſay, *non hæc in fœdera veni.*"

The other Judges concurred in the ſame opinion; Mr. Juſtice *Groſe* cited the caſe of *Bright* v. *Cowper*, (*s*) as a direct authority againſt the plaintiff.

Lawrence, J. ſaid: "I agree with the plaintiff's counſel, that whether the contract be by parol or under ſeal, the operation of the law on it is equally the ſame. When a ſhip is driven on ſhore, it is the duty of the maſter either to repair his ſhip or to procure another; and having performed the voyage, he is then entitled to his freight: but he is not entitled to the whole freight, unleſs he perform the whole voyage, except in caſes where the owner of the goods prevents him; *nor is he entitled pro rata unleſs under a new agreement.* Perhaps the ſubſequent receipt of theſe goods by the defendant might have been evidence of a new contract between the parties: but here the plaintiff has reſorted to the original agreement, under which the defendant only engaged to pay in the event of the ſhip's arrival at *Liverpool.* That event

(*s*) 1 *Brownl.* 21. *But ſee Abbott*, 294.

has

has not happened, and therefore the plaintiff cannot recover in this form of action."

As the right to freight does not commence until the ſhip has broken ground and begun the voyage, no partial payment can be claimed for goods laden on board, if even without the fault of the maſter, the ſhip is prevented from actually ſetting forth on the voyage.

Thus, in the caſe of *Curling* v. *Long*, (*t*) where a ſhip, which took on board a cargo in *Salt River* in *Jamaica*, at a very great expence to the owners (who by the uſage of the *Weſt India* trade fetch the cargoes from the ſhore at *their* expence,) actually cleared out for the voyage, but while waiting for convoy, was cut out of the river by two *French* privateers, and being afterwards retaken was carried into *Port Royal*, where the cargo was ſold under an order of the Court of *Admiralty*, and the proceeds thereof, with the deduction of ſalvage, paid to the merchants. It was decided that nothing could be claimed of the merchants, although each of the Judges expreſsly recognized the rule of the marine law as to the apportionment of freight *pro ratâ itineris*; the Court holding, that in this caſe there had been no commencement of the voyage, and therefore no freight could be due; and that as the freight was by the contract the only remuneration of all the ſervices performed by the owners, they were not entitled to any recompence for the expence of taking the goods on board.

It is obſerved, (*v*) that it often happens that a ſhip is hired by a charter-party to ſail from one port to another, and from thence back to the firſt, as for inſtance, from *London* to *Leghorn*, and back from thence to *London*, at a certain ſum to be paid for every month, or other period of the duration of the employment. Upon ſuch a contract, if the whole is one entire voyage, and the ſhip ſail in ſafety to *Leghorn*, and there deliver the goods of the merchant, and take others on board to be brought to *London*, but happen to be loſt in her return thither, nothing is due for freight, although the merchant has had the benefit of the voyage to *Leghorn*; but if the outward and homeward voyage are diſtinct, freight will be

(*t*) 1 *Bos. and Pul.* 634. *See alſo Abbott*, 296. (*v*) *Abbott.* 296.

due for the proportion of the time employed in the outward voyage.

Thus, in the caſe of *Mackrell* v. *Simond* and *Hankey*, (*u*) which was an action of *covenant* on a charty-party. In the firſt count of the declaration the plaintiff claimed freight for the period of the voyage to *Grenada*; in the ſecond up to the day of the loſs of the ſhip. The facts, as they appeared upon the declaration, were theſe: *Mackrell*, the owner of the ſhip the *Richard*, lying in the river *Thames*, let his ſhip to freight by a charter-party dated 9th of *March*, 1774, to *Simond* and *Hankey* by the month, "for ſuch time as ſhe ſhould be employed in performing a voyage from *London* to *Plymouth*, and the iſland of *Grenada*, and from thence back to *London*," and whereby the plaintiff covenanted, that the ſhip ſhould, purſuant to the order and directions of the freighters, their factors or aſſigns, proſecute and perform the voyage above mentioned, (the danger and perils of the ſea, and the reſtraint of princes and rulers excepted,) and ſhould in ſuch *outward* and *homeward* voyage load and unload all lawful goods;" and that his ſhip's company and boats ſhould aid and aſſiſt in unloading and reloading the ſaid ſhip's cargoes, as cuſtomary at the iſland of *Grenada*, and that he would pay all port charges and pilotage. In conſideration whereof the defendants covenanted, "that they would load and unload the ſhip, and give the maſter proper orders in reſpect thereof: and that the ſhip ſhould be diſcharged out of her ſaid monthly employ on the delivery of her homeward cargo in *London*, and alſo ſhould and would well and truly pay or cauſe to be paid to the ſaid owner, his executors, adminiſtrators, or aſſigns, in full for the freight and hire of the ſaid ſhip, at the rate 110*l.* ſterling, *per calendar* month, for all ſuch time as the ſaid ſhip ſhould be taken up in performing the voyage aforeſaid; to commence and be accounted from the day of the date of the ſaid charter-party, and to end and determine on the day of the diſcharge of the homeward cargo at *London*, and to be paid one-third part thereof on her report inwards at the cuſtom-houſe, *London*, and the remaining two third parts thereof, in two *calendar* months then next following."

In purſuance of this charter party the ſhip took in goods belonging to the merchants *Simond* and *Hankey* at *London*, ſailed with

(*u*) *K. B. Trin. T.* 16 Geo. III. *Abbott.* 298.

them

them to *Plymouth*, and there took in other goods alſo belonging to them, and from thence proceeded to *Grenada*, and there landed the cargo; and received another cargo from the merchant's factor there, with which ſhe ſet ſail for *London*; but on the way was loſt by tempeſt. The voyage to *Grenada* occupied *three* months; and *five* months elapſed in the whole before the loſs of the ſhip.

After the misfortune the owner brought an action againſt the merchants, claiming of them the payment of freight either for three or for five months, which made the difference between the firſt and ſecond counts. The defendants demurred to both counts, inſiſting that nothing was due. The Court, however, decided that freight was payable for *three* months, the period of the outward voyage; and judgment was accordingly given for the plaintiff on the firſt, and for the defendant on the ſecond count. Lord *Mansfield* delivered his judgment to the following effect: "This queſtion depends upon the conſtruction of the charter party. If the parties have expreſſed their meaning defectively, the Court muſt be guided by the nature of the thing. The charter-party puts no caſe but that of a proſperous voyage out and home; it provides for freight on the ſuppoſition that the ſhip will arrive ſafe and report her cargo; no proviſion is made for any other caſe. If the ſhip be caſt away on the coaſt of *England*, and never arrive at the port of *London*, yet if the goods are ſaved, freight ſhall be paid, becauſe the merchant receives advantage from the voyage. This is not expreſſed by the charter party, but ariſes out of the equity of the caſe. *Freight is the mother of wages, the ſafety of the ſhip the mother of freight*: that is the general rule of the maritime law. If there be one entire voyage out and in, and the ſhip be caſt away in the homeward voyage, no freight is due, no wages are due; becauſe the whole profit is loſt, and by expreſs agreement the parties may make the outward and homeward voyage one. Nothing is more common than two voyages; wherever there are two voyages, and one is performed, and the ſhip is loſt in the homeward voyage, freight is due for the firſt. Here the outward and homeward voyage are ſo called in the charter-party. The cargo is loaded outwards, and the owner covenants to pay port charges on the outward voyage. The whole of that voyage was completed: port duties are incurred and paid. Nothing however is due on the homeward voyage, though the ſhip might be out a month."

But in the caſe of *Byrne* and others v. *Pattinſon*, (*w*) the words of the charter-party being different, a different conſtruction prevailed. *Pattinſon*, maſter and part-owner of the ſhip *William* and *Mary*, lying at *Liverpool*, by a charter-party, dated 28th of *July*, 1794, let the ſhip to freight to *Byrne* and others, for a voyage intended to be made from *Liverpool* to the iſland of *Madeira*, and from thence to the iſland of *Barbadoes*, and from thence back to *Liverpool*, *Greenock*, or *Briſtol*, but with liberty for the freighters to order the ſaid veſſel from *Barbadoes* to any one other iſland in the *Weſt Indies*, (*Jamaica* excepted), they paying all pilotage and port charges incurred thereby. And the ſaid freighters accordingly by the ſaid charter-party took and hired the ſame in manner following, (that is to ſay), "that the maſter ſhould immediately receive and take a cargo on board the ſaid veſſel from the freighters, and the ſaid veſſel ſo laden ſhould immediately proceed directly to *Madeira*, and deliver ſuch goods as ſhould be ordered by the ſaid freighters, and alſo ſhould receive and take on board the ſaid veſſel at *Madeira*, ſuch other goods as the ſaid freighters might think proper to ſhip, and that being done, the maſter ſhould proceed with the ſaid veſſel to *Barbadoes*, and there make delivery of her cargo, and receive and take on board a cargo from the freighters, and being loaden therewith, ſhould with the firſt opportunity proceed directly to the port of *Liverpool*, *Greenock*, or *Briſtol*, and there deliver the ſame cargo, *and ſo end the ſaid intended voyage*." In conſideration of which the ſaid freighters thereby promiſed and agreed, amongſt other things, "to pay to the defendant, in full for the freight and hire of the ſhip for the ſaid voyage, the ſum of 136*l.* 10*s. per calendar* month for *ſix months certain*, to commence in eight days after ſhe was ready to receive the cargo at *Liverpool*, and to continue until ſhe was diſcharged at *Liverpool*, *Greenock*, or *Briſtol*, together with two thirds the amount of all pilotage and port charges that might accrue, and be paid during the courſe of the ſaid voyage, with cuſtomary primage; payment thereof to be made in manner following, *viz.* 136*l.* 10*s.* to be advanced before the ſailing from *Liverpool*, by a good bill at three months' date, and what caſh might be required for the ſaid veſſel's diſburſements and port charges at *Madeira* and *Barbadoes*, to be paid in part of the ſaid freight, and the remainder of the ſaid freight ſhould become due

(*w*) *K. B. Trin. T.* 37 Geo. III. *Abbott*, 301.

and

and be paid on the final diſcharge of the ſaid veſſel at *Liverpool, Greenock,* or *Briſtol,* by good bills on *London* at three months date." The period of computation commenced on the 7th of *Auguſt,* 1794; on the 19th of that month the ſhip ſailed from *Liverpool* for *Madeira,* freighted with goods, and arrived there on the 19th of *September,* and diſcharged at that place by the 4th of *October,* as many of the goods as were to be delivered there, and took on board on account of the merchants ninety pipes of wine, and ſailed from thence on the 9th of *October* for *Barbadoes,* but on the 10th of *November* was captured on the way thither. The merchants had paid 135*l.* part of the freight for the firſt month, and alſo the port charges and diſburſements for the ſhip at *Madeira. Pattinſon* now claimed in the preſent ſuit further freight from the 7th of *September* to the day of the ſhip's capture, or to the day when ſhe had completed the delivery at *Madeira,* or freight for the goods delivered there at the uſual rate of conveyance, allowing the 135*l.* But the Court held, that he had no claim whatever. On his part it was contended, that there ought to be an apportionment in this caſe; and a paſſage cited from *Malyne,* (*x*) relating to a ſhip loſt at *Dover,* was quoted as an authority in his favour. But Lord *Kenyon,* Ch. J. ſaid: "In that caſe the goods came to the merchant's hands, and the owner of the ſhip might have provided another ſhip to carry them to *London.* In this caſe, by the terms of the contract, the freight is to *become due* at *Liverpool,* and therefore it cannot be claimed before."

.2 *Of the Payment of Freight, and againſt whom it is recoverable, &c.*] The time and manner of payment of freight are frequently regulated by expreſs ſtipulations in a charter-party, and when that is done, the payment muſt be according to the agreement. But if there be no expreſs ſtipulation, the goods conveyed generally remain as a ſecurity until the freight is paid; for the maſter is not bound to deliver them without payment: (*y*) and if by the regulations of the revenue the goods are to be landed and put into the King's warehouſe, if the duties are not paid, the maſter may enter them in his own name, and thereby preſerve his lien. And as he has this power to enforce payment, ſo it very often becomes his duty to exerciſe it; for where goods are conſigned by one merchant to another it might often be highly prejudicial to the conſignor to be called upon

(*x*) *Page* 98. (*y*) *Doug.* 104. *Abbott.* 228. 259.

at the ſhip's return to pay the freight, which he had reaſon to expect the maſter would obtain from the conſignee. (*z*) And where an action was brought for freight on a charter-party, by which it was agreed that the goods ſhould be delivered at *London* agreeably to the bills of lading, and by the bills of lading they were to be delivered to a third perſon on his payment of the freight, and in fact they were delivered to him, but he refuſed to pay the freight, becauſe the merchant, the defendant, who was the conſignor, was indebted to him to a greater amount. Lord *Kenyon*, Ch. J. held, that the freight could not be recovered of the conſignor, for the maſter ought not by the terms of the contract to have delivered the goods without receiving the freight from the conſignee. (*a*) Indeed, if a conſignee receive goods in purſuance of the uſual bill of lading, by which it is expreſſed that he is to pay the freight, he by ſuch receipt makes himſelf debtor for the freight, and may be ſued for it. (*b*)

If a conſignee, known as ſuch to the maſter, ſell the goods before they are landed, he and not the buyer is liable to be ſued for the freight, although the buyer enter the goods at the cuſtom-houſe in his own name.

Thus, in the caſe of *Artaza* v. *Smallpiece*, (*c*) which was an action of *aſſumpſit* brought to recover the amount of the freight of 170 cheſts of oranges and lemons, which had been ſhipped in a general ſhip from *Portugal*, and the bill of lading was *to the order of the ſhipper*. The goods had been entered at the cuſtom-houſe in the name of the defendant, and it was proved, that in general, where the goods are ſo ſhipped, to the order of the ſhippers, that the perſon in whoſe name the goods are entered at the cuſtom-houſe, is conſidered as liable to the freight; upon which principle the preſent action had been brought.

To prove this caſe, a witneſs was called on the part of the plaintiff, who proved the bill of lading, and the entry at the cuſtom-houſe to have been made in the name of the defendant; but in the courſe of his examination it appeared, that the defendant had bought them of one *Haynes*, to whom the bill of lading had

(*z*) *Abbott*, 259. (*a*) Pernoſe *and others* v. Wilks, *Sitt. aft. Hil. Term*, 179[illegible] *coram Lord* Kenyon, *Ibid.*
(*b*) Roberts v. Holt, 2 *Show* 443. (*c*) 1 *Eſp. Rep.* 23.

been

been indorſed and ſent by the ſhipper, which circumſtance was known to the plaintiff.

Upon this evidence, it was contended for the defendant, that the action ſhould have been brought againſt *Haynes*, not againſt the defendant: that *Haynes* was the conſignee, and in that character liable to the freight; and that the cuſtom of making him liable in whoſe name the goods were entered at the cuſtom-houſe, could only take place where ſuch perſon was in fact the conſignee, or where the conſignee was not known.

But, Lord *Kenyon*, Ch. J. ſaid: "The captain has a right to retain the goods ſhipped on board his veſſel till he is paid his freight: if he parts with the poſſeſſion of them, he muſt then reſort to his contract. In the caſe of goods conſigned, the conſignee is the perſon liable to the freight, not the perſon to whom he ſells them: that would be to enhance the price on him as he muſt be ſuppoſed to buy them at a certain price independent of all charges, unleſs ſuch charges are made part of the bargain. A right of action cannot be transferred from the perſon liable, to another, by ſuch perſons own act. He therefore who is firſt liable muſt remain ſo. Here *Haynes* was the conſignee, and known to be ſuch to the plaintiff who cannot, by any ſuppoſed cuſtom, transfer the liability to the defendant, who is only the purchaſer of the goods from him. I am therefore of opinion the plaintiff muſt be called."

So, the entry of goods at the cuſtom-houſe, made by a perſon, who is only agent for the conſignor, and known to the maſter to be acting in that character, does not render ſuch agent liable to be ſued for the freight. (*d*)

The mortgagee of a ſhip is not entitled to the freight until he actually takes poſſeſſion of the ſhip.

Thus, in the caſe of *Chinnery* v. *Blackburne*, (*e*) which was an action of *indebitatus aſſumpſit* for freight of goods from *Antigua* to *London*. Upon the trial a verdict for the plaintiff was taken, ſubject to the opinion of the Court of *King's Bench*, on a caſe which ſtated, that by an indenture of aſſignment, dated *January* 4th,

(*d*) Ward v. Felton, 1 *Eaſt Rep.* 507.
(*e*) *K. B. Eaſt Term*, 24 Geo. III. 1 *H. Bl.* 117. *Sed* Vide Ante 335.

1783, *Ro-*

1783, *Robert Merryfield*, in conſideration of 1166*l.* 18*s.*, which he owed to the plaintiff, aſſigned to her the ſhip B. &c., in which indenture there was a covenant from the plaintiff to re-aſſign the ſaid ſhip, &c. to *Merryfield*, on payment of 1166*l.* with lawful intereſt, on or before the 10th of *November* then next enſuing; that, at the time of the execution of the deed, the ſhip was in the river *Thames*, and afterwards ſailed to *Portſmouth*, and continued there till the middle of *March* following, in the poſſeſſion, and under the command of A. B.; and that the plaintiff did not then take poſſeſſion: that *Merryfield* navigated, victualled, and manned the ſhip, as owner thereof, at his own expence and riſque, both from *England* to *Antigua*, and on her return from thence; that *Merryfield* at *Antigua* gave the command of her to Captain *Dryſdale*, and ſent her to *England*, with orders to the captain to addreſs himſelf to Meſſrs. *Dunlop*, of *London*, merchants, who were to ſell her according to the directions contained in a letter, in which letter *Merryfield* alſo ſaid, "Mrs. *Chinnery* has a demand againſt me "for near 1200*l.* ſterling, which I hope to remit ſhortly to you, or Mrs. *Merryfield*, ſo as to pay her:" that Meſſrs. *Dunlop* being applied to as conſignees, lent two ſums of 50*l.* to Captain *Dryſdale*, declaring they ſhould conſider him as reſponſible, in caſe they ſhould not receive the ſame by freight, &c.; and that they afterwards received the money from *Dryſdale*: that the ſhip completed the delivery of the cargo on the 27th of *September* 1783; that the plaintiff took poſſeſſion on the 29th of *September* following, immediately on receiving information of her arrival in the *Thames*; that *the defendant had goods from Antigua on board, the freight of which amounted to* 76*l.* 9*s.* 11*d.*, *for the recovery of which the action was brought*: that Captain *Dryſdale* paid for lights, cuſtom-houſe dues and for clearing the ſhip, which the plaintiff repaid him, and alſo paid his and the mariners' wages for the voyage from *Antigua*, to the amount of 234*l* 7*s.* 7*d.*, after ſhe took poſſeſſion of the ſhip; and that the plaintiff afterwards ſold the ſhip by auction for 710*l.* &c.

The Court determined that the plaintiff was not entitled to the freight.

Lord *Mansfield* ſaid, "The juſtice of the caſe ſtruck me forcibly at firſt, as between the mortgagor and mortgagee: but the mortgagor is no party; the action is brought after the mortgage, againſt a perſon who contracted with the mortgagor. This action

muſt

muſt be founded on the idea that the mortgagor in poſſeſſion is the ſervant and agent for the mortgagee, which is not the caſe. Till the mortgagee takes poſſeſſion, the mortgagor is owner to all the world; he bears the expences, and he is to reap the profits."

Aſhhurſt. J. "If the voyage had proved unprofitable, could the mortgagor have recovered againſt the mortgagee the expence of the outfit? yet this muſt have been the caſe if the mortgagee were entitled to the profits."

Buller, J. If the mortgagor be conſidered as agent, he muſt be ſo throughout, and then the mortgagee would be anſwerable for every loſs, damage, &c. The payments by the plaintiff were voluntary, to get poſſeſſion of the ſhip free from any liens, and are at moſt but evidence of the mortgagee's poſſeſſion.

Where a ſhip is freighted by the *month*, it is to be underſtood of a *calendar*, not a *lunar* month. (*f*)

In the caſe of a general ſhip, and where there is no charter-party, or other covenant under ſeal, the freight is recoverable by action of *indebitatus aſſumpſit*, (*g*) which may be brought either in the name of the maſter, or his owners; but where it is brought by the latter, they muſt all be made co-plaintiffs. (*h*)

If the contract for freight be under a charter-party, or other deed, the proper and only form of action is *Debt, or Covenant* upon the deed. (*i*)

4. *Of Demurrage.*

It is commonly agreed between the merchant and owner that the former ſhall load and unload the ſhip within a limited number of days after ſhe ſhall be ready to receive the cargo, and after arrival at the deſtined port. But it is frequently ſtipulated that the ſhip ſhall, if required, wait a further time to load or unload, or to ſail with convoy, for which the merchant ſhall pay a daily ſum. This delay, and the payment to be made for it, are both called *demurrage*. (*k*)

(*f*) Jolly *v.* Young, 1 *Eſp. Rep.* 186. (*g*) Prior *v.* Shears, 1 *Vent.* 100. (*h*) *Abbott.* 88. (*i*) Atty *and another* v. Pariſh *and another*, 1 *New Rep. C. B.* 104. (*k*) *Abbott.* 178.

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The word "*days*," uſed alone in a clauſe of demurrage for unlading in the river *Thames*, is ſaid (*l*) to be underſtood of working days only, and not to comprehend Sundays or holidays, by the uſage among merchants in *London*; but it is much better to mention working, or running days, expreſsly, according to the intention of the parties.

The payment of *demurrage*, ſtipulated to be made while a ſhip is waiting for *convoy*, ceaſes as ſoon as the convoy is ready to depart; and ſuch payment, ſtipulated to be made while a ſhip is waiting to receive a cargo, ceaſes when the ſhip is fully laden, and the neceſſary clearances are obtained, although the ſhip may in either caſe happen to be further detained by adverſe winds, or tempeſtuous weather: and if the ſhip has once ſet ſail and departed, but is afterwards driven back into port, the claim of demurrage is not thereby revived. (*m*)

5. *Of Paſſage-Money.*

In the caſe of *Molloy* v. *Backer*, (*n*) which was an action of *aſſumpſit* for paſſage money. The facts of the caſe were theſe: the plaintiff contracted to carry the defendant, his family, and luggage, from *Demerary* to *Fluſhing*; and in the courſe of the voyage, within four days' ſail of *Fluſhing*, the ſhip was captured by an *Engliſh* ſhip of war, and brought into *England*, and the ſhip and cargo libelled for prize in the Court of *Admiralty*, and the cargo condemned, and proceedings ſtill pending againſt the ſhip; but the defendant and his family were liberated, and their luggage in fact reſtored to their poſſeſſion. The Court held, that however the queſtion might be as to the plaintiff's right to recover paſſage-money upon an *implied aſſumpſit pro ratâ itineris*, if the ſhip were reſtored, yet *pending the proceedings againſt the ſhip as prize in the Admiralty Court*, no ſuch action could be maintained; for *non conſtat* but that the ſhip might be condemned, and the freight decreed to the captors.

(*l*) Cochran *v.* Retberg, 3 *Eſp. Rep.* 121.

(*m*) *Vide* Lannoy *v.* Werry, 4 *Bro. P. C.* 630. Jamieſon *v.* Laurie, 6 *Bro. P. C.* 474. *oct. ed. Abbott.* 182. (*n*) 5 *Eaſt Rep.* 316.

6. *Of Seamen's Wages.*

Firſt, Of the Contract of hiring.] In order to prevent the miſchiefs that frequently aroſe from the want of proper proof of the preciſe terms upon which ſeamen engaged to perform their ſervice in merchant ſhips, it was enacted by 2 Geo. II. c. 36. ſ. 1. (made perpetual by 2 Geo. III. c. 31.) "That it ſhall not be lawful for any maſter or commander of any ſhip or veſſel bound to parts beyond the ſeas, to carry any ſeamen, or mariners, except his apprentice, or apprentices, to ſea, from any port or place where he or they were entered or ſhipped, to proceed on any voyage to parts beyond the ſeas, without firſt coming to an agreement, or contract with ſuch ſeamen, or mariners, for their wages; which agreement, or agreements, ſhall be made in writing, declaring what wages each mariner is to have reſpectively during the whole voyage, or for ſo long time as he or they ſhall ſhip themſelves for; and alſo to expreſs, in the ſaid agreement or contract, the voyage for which ſuch ſeamen or mariner was ſhipped to perform the ſame, under a penalty of 5*l.* for each mariner carried to ſea without ſuch agreement, to be forfeited by the maſter to the uſe of *Greenwich Hoſpital.* (*o*) And by ſect. 2. this agreement is to be ſigned by each mariner, within three days after he ſhall have entered himſelf on board the ſhip, and is, when ſigned, concluſive and binding upon all parties. The ſtatute 2 Geo. III. c. 31. ſ. 2. has extended theſe proviſions to all his Majeſty's colonies in *America.*

And by the ſtatute 31 Geo. III. c. 39. a ſimilar agreement in writing is required to be ſigned by the maſter and mariners of veſſels of the burthen of one hundred tons or upwards, employed in the *coaſting trade* from any port or place in *Great Britain*, to any other port or place in *Great Britain*, and going to open ſea. And by the 10th ſection of this act, the agreement need not be ſtamped.

By the ſtat. 37 Geo. III. c. 73. ſ. 1. (which relates to ſhips trading to the *Weſt Indies*,) it is enacted, "that every ſeaman who ſhall deſert at any time during the voyage, either out or home, from any *Britiſh* merchant ſhip trading to or from his Majeſty's

(*o*) *Vide the caſe of* Elſworth *v.* Woolmore, *poſt.*

colonies and plantations in the *Weſt Indies*, ſhall, over and above all puniſhments, penalties, and forfeitures, to which he is now by law ſubject, forfeit all the wages he may have agreed for with, or be entitled to, during the voyage, from the maſter or owner of the ſhip on board of which he ſhall enter, immediately after ſuch deſertion."

And by ſection 2, of the ſame act, it is alſo enacted, "That all "and every maſter or commander of any *Britiſh* merchant ſhip, "who ſhall, from and after the firſt day of *July* 1797, hire or en- "gage to ſerve on board his ſhip or veſſel any ſeaman, mariner, or "other perſon who ſhall, to the knowledge of ſuch maſter, have "deſerted from any other ſhip, or veſſel, ſhall forfeit and pay the "ſum of one hundred pounds." It is obſerved, (*p*) that as this clauſe is expreſſed in general terms, and is not limited to ſhips engaged in the *Weſt India* trade, either by direct reference to the preamble of the ſtatute, or otherwiſe, it may probably be held to extend to all caſes, and not to be confined to the maſters of ſhips engaged in that trade.

By the third ſection of the ſame ſtatute it is alſo enacted, "That no maſter, or commander of any merchant ſhip, or veſſel, which ſhall, from and after the firſt day of *July* 1797, ſail or proceed from any port or place in *Great Britain*, ſhall hire or engage, or cauſe or procure to be hired or engaged, any ſeaman, mariner, or other perſon, at any port or place within his Majeſty's colonies or plantations in the *Weſt Indies*, to ſerve on board any ſuch merchant ſhip or veſſel, at or for greater or more wages, or hire, for ſuch ſervice, than according to the rate of double monthly wages, contracted for with the ſeamen, mariners, and other perſons hired or engaged to ſerve on board ſuch ſhip or veſſel, at the time of her then laſt departure from *Great Britain*, being in the ſame degree and ſtation in which ſuch ſeaman, mariner, or other perſon ſhall be ſo hired or engaged, at any ſuch port or place as aforeſaid, unleſs the governor, chief magiſtrate, collector, or comptroller of ſuch port or place in the ſaid colonies, or plantations, ſhall think that greater or more wages, or hire, than double the monthly wages aforeſaid, ſhould or ought to be given to ſuch ſeaman, mariner, or other perſon as aforeſaid, and do and ſhall accordingly authorize or direct the ſame to be given, by writing under his

(*p*) *Abbott.* 386.

hand;

hand; that then and in such case the master or commander of such ship, or vessel, shall and may be at liberty to pay, and the seamen, mariner, or other person on board such ship, or vessel, to receive such greater or higher wages as such governor, chief magistrate, collector, or comptroller shall direct as aforesaid; and that all contracts and securities made, entered into, or given, contrary to the intent and meaning of this act, are made null and void, to all intents and purposes."

But by the 10th section of the act it is provided, nevertheless, "That nothing in this act shall extend, or be construed to extend to any contract, or agreement, which shall or may be made with any seaman, mariner, or other person hired or engaged to serve on board any merchant ship or vessel, at any port or place within his Majesty's colonies or plantations in the *West Indies*, who shall, at the time of such hiring, or engagement, produce and deliver to the master and commander of such ship or vessel, a certificate, under the hand of the master or commander of the ship or vessel on board of which such seaman mariner, or other person had then last served, signed in the presence of one or more witness, or witnesses, stating their usual place, or places of abode, thereby declaring or certifying that such seaman, mariner, or other person had been duly discharged from the ship, or vessel, on board of which he had so last served; and which certificate the said master or commander shall grant within three days next after application made to him by such seaman, mariner, or other person, before a witness, or, in default thereof, shall forfeit and pay the sum of twenty pounds, to be levied, recovered, and applied in manner hereinbefore directed; nor to any contract, or agreement, to be made with any seaman, mariner, or other person hired or engaged to serve on board any merchant ship or vessel, which, through necessity, or on account of very hazardous service, or extraordinary duty, require such contract or agreement to be made, and more wages or hire given, and of which necessity, service, or extraordinary duty proof shall be made, on oath, before the chief magistrate, or principal officer of any port or place, or before any justice or justices of the peace of the said colonies, or plantations: and provided also that such seaman, mariner, or other person so hired or engaged to serve on board any ship or vessel so requiring such service, shall not have deserted from the ship or vessel on board of which he had then last served; and provided also that no

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greater or higher wages, or hire, ſhall be given by any maſter or commander, or taken or received by any ſeaman, mariner, or other perſon as aforeſaid, except in caſes of ſuch neceſſity, very hazardous ſervice, or extraordinary duty as aforeſaid, than after the rate of double the monthly wages, or the wages to be ſettled or directed by any governor, chief magiſtrate, collector, or comptroller, as hereinbefore directed, to be paid or received as aforeſaid."

Upon this clauſe of the ſtatute Mr. *Abbott* obſerves, (*q*) "That it is difficult to collect the real intention of the legiſlature from this long and confuſed proviſo. If, as at firſt ſight appears, it was intended to allow the maſter to give more than double wages, without the authority of a magiſtrate, in *two* caſes; namely, firſt, to mariners producing a certificate of diſcharge from their laſt ſhip; and, ſecondly, in the caſe of neceſſity, hazardous ſervice, or extraordinary duty, proved upon oath, to mariners who have not deſerted from their laſt ſhip; then the *laſt* part of the clauſe will be ineffectual. If, on the other hand, it was intended to allow this power to the maſter only in the caſe of neceſſity, &c. ſo proved, and to mariners who have not deſerted, then the *firſt* part of the clauſe will be ineffectual."

Soon after the paſſing of this ſtatute, it was decided, that a licence given by a magiſtrate in the *Weſt Indies* to the maſter of a ſhip, "to procure men on ſuch terms as he could to navigate the ſhip home," was not a compliance with the regulation preſcribed; and that a mariner could not maintain an action on a promiſe made in purſuance of ſuch licence to pay wages exceeding in amount double the wages agreed to be given to a perſon in the like ſituation on the outward voyage: for that the ſtatute required the magiſtrate to exerciſe his own diſcretion as to the rate of wages to be paid, and to ſpecify the ſame in the licence (*r*).

A form of articles of agreement between the maſter, officers, and mariners of *Britiſh* ſhips employed in carrying ſlaves from the coaſt of Africa, is annexed to the ſtatutes made for regulating the manner of carrying ſlaves in ſuch ſhips, which contains ſeveral regulations applicable to that particular employment, and is the only form allowed to be uſed for ſhips in that employment (*s*).

(*q*) *Page* 389. (*r*) Rodgers *v.* Lacy, 2 *Bos. and Pul.* 57.
(*s*) *Abbott.* 390.

Theſe

Theſe legiſlative proviſions reſpecting ſeamen extend to every officer of the ſhip, except the maſter. His contract can only be made with the owners, and is not required to be in writing.

The ſtatutes do not render a verbal agreement for wages abſolutely void, but impoſe a penalty on the maſter if a written agreement is not made. When a written agreement is made, it becomes the only evidence of the contract between the parties; and a mariner cannot recover any thing agreed to be given in reward for his ſervice, which is not ſpecified in the articles. This has been decided (*t*) with reſpect to a promiſe to pay to the mate of a ſhip employed in the ſlave trade the average price of a ſlave at the place of the ſhip's deſtination; and alſo with reſpect to a promiſe to pay a ſail-maker, ſerving in a ſhip belonging to the *Eaſt India* Company, a monthly ſum beyond the wages mentioned in the ſhip's articles, which had been ſigned by him as ſail-maker. (*u*)

A ſeaman who has engaged to ſerve on board a ſhip, is bound to exert himſelf to the utmoſt in the ſervice of the ſhip; and therefore a promiſe made by the maſter when the ſhip was in diſtreſs, to pay an extra ſum to a mariner, as an inducement to extraordinary exertion on his part, was eſteemed to be wholly void (*v*).

But in the caſe of *Campion* v. *Nicholas*, (*w*) where the cargo of the ſhip was loſt by the capture of a *Swediſh* privateer, who carried her into *Gottenburgh*: the maſter ſtaid there three months to refit the ſhip, and take in new lading; and to prevent the ſeamen from going away, he agreed to pay them ſo much per month whilſt they ſtaid there; and in an action for this the maſter would have diſcharged himſelf on the rule that freight is the mother of wages, and that none are ever paid while the ſhip is lading and unlading; which the Chief Juſtice agreed to be the general doctrine: but he held it not ſufficient to controul a ſpecial agreement, as there was in this caſe, and where too there was ſo long a ſtay at *Gottenburgh*.

(*t*) White v. Wilſon, 2 *Bos. & Pul.* 116. 2 *Rob. Adm. Rep.* 241. *Abbott*, 391.

(*u*) Ellſworth v. Woolmore, *Guildhall Sitt. December* 1803, *before Lord* Alvanley, *Ch. J. Abbott*, 391.

(*v*) Harriſon v. Watſon, *Peake's Cas. N. P.* 52. (*w*) 1 *Stra.* 405.

So, a promiſe by a captain of a ſhip on behalf of his owners, after the ſhip was taken, to pay monthly wages to one of the ſailors, in order to induce him to become a hoſtage, is binding on the owners, although they abandon the ſhip and cargo. (*x*)

Of the Seaman's Right to the Whole or Part of his Wages; and of the Loſs and Forfeiture thereof, &c.

1. *Where the ſeaman actually performs his duty, or is prevented from doing it, either by illneſs, or the miſconduct of the maſter, and the ſhip earns her freight.*] A ſeaman, who has faithfully performed his ſervice on board a ſhip during the whole period of the intended voyage, is entitled to receive the whole of the ſtipulated reward, if no diſaſter has rendered his ſervice uſeleſs or unproductive to his employer. And as a ſeaman is expoſed to the hazard of loſing the reward of his faithful ſervice during a conſiderable period in certain caſes; ſo on the other hand the law gives him his whole wages, even when he has been unable to render his ſervice, if his inability has proceeded from any hurt received in the performance of his duty, or from natural ſickneſs happening to him in the courſe of the voyage (*y*). And if a maſter, in violation of his contract, diſcharges a ſeaman from the ſhip during the voyage, the ſeaman will be entitled to his full wages up to the proſperous determination of the voyage, deducting, if the caſe require it, ſuch a ſum as he may, in the mean time, have earned in another veſſel. *

So, if a maſter of a ſhip, by inhuman treatment, compels a ſailor to quit a ſhip, the latter is entitled to his wages for the voyage performed.

Thus, in the caſe of *Limland* v. *Stephens* (*z*), which was alſo an action of *indebitatus aſſumpſit* for ſeamen's wages. The plaintiff and defendant were natives of *Sweden*. The plaintiff had entered on board the ſhip at *Stockholm*. The articles were out and home. She had made a circuitous voyage, and arrived in the *Thames* in *December*, 1800. The defendant had aſſaulted and beat the plaintiff ſeveral times in the courſe of the voyage; and had put him before the maſt, as a common ſailor, though he had been hired in the capacity of mate. The plaintiff applied to the *Swediſh* conſul, ſtating his ſituation, but nothing was done; the conſul only deſiring the defendant to attend him, which he refuſed to do.

(*x*) Yates v Hall, 1 *Term Rep.* 73. (*y*) *Vide Abbott*, 392 * *Ibid.*
(*z*) 3 *Eſp. Rep.* 269.

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The defence relied on was, that the plaintiff being a failor, had hired himſelf with the defendant, under certain articles, by which the defendant was bound, under a penalty, to bring back his crew to *Sweden*; ſo that no action could be maintained in *England*, or until the completion of the voyage.

Lord *Kenyon*, Ch. J. ſaid, "There are reciprocal duties between maſters and ſervants. From the ſervant is due obedience and reſpect; from the maſter, protection and good treatment. Deſertion is a forfeiture of wages; but if the captain conducts himſelf in ſuch a way as puts the failor into that ſituation that he cannot, without damage to his perſonal ſafety, continue in his ſervice, human nature ſpeaks the language,—a ſervant is juſtified in providing for that ſafety. After the plaintiff had been with the conſul, he communicated with the defendant the wiſh of the conſul to ſee him. The captain ſaid, "he would go when it ſuited "him;" and being preſſed by the plaintiff to do ſo, he beat the plaintiff very ſeverely; threw a log of wood which hurt his foot. The plaintiff left the ſhip; and the defendant was heard to ſay, that if he returned he would chain him to the maſt, and bring him to *Sweden*."

Erſkine, as counſel for the defendant, ſaid, "The plaintiff cannot juſtify a deſertion by reaſon of the defendant having beat him: for that he could have an action of aſſault, which is a proper remedy. In this caſe the plaintiff failed under articles, by which the captain is bound to bring back his crew to *Sweden*, under a penalty; and the failor forfeits his wages by deſertion."

Sed per Lord *Kenyon*, "Is a man bound to ſerve at the peril of his life? Deſertion is an anſwer to the ſeaman's claim for wages; but that muſt be a voluntary act of the ſeaman's, and not to be cauſed by any act of the captain. In this caſe the act of the captain has made the diſſolution of the contract neceſſary, and, in my opinion, juſtifiable on the part of the failor; and I think that he is intitled to a verdict." The jury accordingly found a verdict for the plaintiff.

But, in the caſe of *Hulle* v. *Heightman*, (*a*) it was determined by the Court of *King's Bench* that a ſeaman having contracted to go a

(*a*) 2 *Eaſt Rep.* 145. 4 *Eſp. Rep.* 77. *S. C.*

voyage from A. to B. and back again, with a ſtipulation that he ſhould not be entitled to his wages till the end of the voyage, cannot maintain a general *indebitatus aſſumpſit* to recover his wages *pro rata* as far as B.; though he were there wrongfully diſmiſſed by the defendant, (the captain:) but his remedy is either for the breach of the ſpecial contract, or for ſuch tortious act of the captain's, whereby he was prevented from earning his wages.

2. *Of ſtipulated Wages.*] In the caſe of *Williams* v. *Brown*, (*b*) the plaintiff agreed to ſerve as a ſeaman during a voyage to and from the *Weſt Indies*: on his arrival there he was claimed as a run-away ſlave, and delivered up to his maſter; whereupon it was agreed between the plaintiff, his maſter, and the captain, that upon payment of a ſum of money by the captain to the maſter, the latter ſhould manumit the plaintiff, he covenanting to ſerve the captain as a ſeaman for three years at certain ſtipulated wages. The plaintiff was accordingly manumitted, and having ſerved the captain upon the homeward voyage, commenced an action againſt him to recover wages for that voyage upon a *quantum meruit*. The court decided, that he was eſtopped by his covenant from claiming more than the ſum ſtipulated.

3. *Where the Owners do not ſend the Ship on her intended Voyage.*] If after the hiring of ſeamen, the owners do not think fit to ſend the ſhip on her intended voyage, the ſeamen are to be paid for the time during which they may have been employed on board the ſhip. And if they ſuſtain any ſpecial damage by breaking off the contract, it ſeems reaſonable alſo that they ſhould recover ſuch damage by a ſpecial action on the agreement. (*c*)

4. *Of Outward and Homeward bound Voyages.*] It is obſerved (*d*) that the payment of wages is generally dependent on the payment of freight: if the ſhip has earned its freight, the ſeamen, who have ſerved on board the ſhip, have in like manner earned their wages. And as in general, if a ſhip deſtined on a voyage out and home has delivered her outward-bound cargo, but periſhes in the homeward voyage, the freight for the outward voyage is due, ſo in the ſame caſe (*e*) the ſeamen are entitled to receive their wages for the time employed in the outward voyage, and

(*b*) 3 *Bos. and Pul.* 69. (*c*) *Vide Abbott*, 401.
(*d*) *Abbott*, 398. *ad* 400. (*e*) 1 *Lord Raym.* 639, 739.

the

the unloading the cargo. And if a ſhip ſails to ſeveral places, wages are payable to the time of the delivery of the laſt cargo. Upon the ſame principle, where money had been advanced to the owners in part of the freight outward, and the ſhip periſhed before her arrival at the port of delivery, it was held, (*f*) that the ſeamen were entitled to wages in proportion to the money advanced. If, as ſometimes happens, a charter-party be ſo framed as to exclude the owners from demanding freight for the carriage of the outward-bound cargo, unleſs the ſhip brings back her homeward-bound cargo in ſafety, it ſeems that ſuch a ſpecial agreement, whereby the owners conſent to relinquiſh a benefit, to which they are entitled by the general principles of law, ought not to affect the ſeamen, or deprive them of their general right, unleſs *they* alſo by the terms of their contract make the like agreement on their part. Indeed it was once decided in the *Court* of *Admiralty*, (*g*) that the ſeamen, who had navigated a ſhip chartered by the *Eaſt India Company*, and which had delivered her outward-bound cargo in the *Eaſt Indies*, but was loſt in the homeward voyage, were entitled to recover wages for the outward voyage from the maſter, although the owners had covenanted with the company not to demand any freight beyond the impreſs money, of which the ſeamen had received their ſhare, unleſs the ſhip returned home in ſafety; and although the mariners themſelves had given bonds to the maſter to the ſame effect with regard to their wages. And Chief Juſtice *Holt*, is ſaid to have decided a cauſe tried before him in the ſame manner. (*h*) But this deciſion of the *Court* of *Admiralty* is reported to have been diſapproved of by the *Houſe* of *Lords*, who in a caſe (*i*) ariſing out of it between the maſter and the owners, gave liberty to the parties to appeal to the delegates againſt the deciſion.

5. *In Caſes of Embargo or Hoſtile Detention.*] Where a ſeaman is hired by the *month*, and the ſhip is detained in a foreign port by an embargo; and he remains with the ſhip during the period of the embargo; if the ſhip afterwards performs her voyage, and earns freight, *the* ſailor is entitled to his full wages, including the period of the ſhip's detention. (*k*)

(*f*) 2 *Show.* 283. (*g*) Buck *v.* Rawlinſon, 1 *Bro. P. C.* 137. *oct. ed.* (*h*) Edwards *v.* Child, 2 *Vern.* 727. (*i*) Buck *v.* Rawlinſon, 1 *Bro. P. C.* 137. *oct. ed.* (*k*) 3 *Bos. & Pul.* 415. 418. *Abbott*, 393.

So, in the caſe of a hoſtile detention by a foreign ſtate, if the ſhip ultimately performs her voyage, the ſailor is entitled to wages during his detention, though he be forcibly taken from the ſhip by the orders of a foreign prince.

Thus, in the caſe of *Beale* v. *Thompſon*, (*l*) where the plaintiff had been hired to ſerve on board the *Iſabella* from the port of *London* to *Peterſburgh*, and from thence back to *London*, at 5*l. per* month. The circumſtances of the detention of this, and ſeveral other veſſels and their crews were as follow: The ſhip ſailed to *Peterſburgh*: and the detention firſt took place there on the 5th of *November*, 1800, and in the public orders of the *Ruſſian* Government it was called an embargo, and was ſaid to be impoſed on the ground of a breach of faith on the part of this country reſpecting the *Iſland* of *Malta*. The maſters and crews were ſoon afterwards forcibly taken from their veſſels; ſuch of the ſeamen as were the ſubjects of other countries were liberated at the requeſt of their conſuls; but the *Britiſh* maſters and mariners were marched in parties into the interior of the country, and treated as priſoners of war. A convention hoſtile to *Great Britain* was formed between *Ruſſia*, *Sweden*, and *Denmark*; an embargo was impoſed in this country on the veſſels of thoſe nations; actual hoſtilites took place; and a *Britiſh* fleet forced the ſound, and attacked *Copenhagen*. Upon the death of *Paul*, and the ſucceſſion of the preſent emperor *Alexander*, peace was reſtabliſhed; and the ſhips, which had been detained on both ſides, were mutually reſtored. This reſtitution took place in *Ruſſia* at the end of *May* 1801; the *Britiſh* mariners returned with their veſſels, which brought home their cargoes, and earned their freight.

The Court of *King's Bench*,* upon a writ of error from the Court of *Common Pleas*, decided, that ſuch ſeizure, however hoſtile in the manner, ſo far partook of the nature of an *embargo*, in its reſult, and not of a *capture*, that it did not put an end to the contract of a mariner for wages, even during the time of ſuch detention and impriſonment. But even conſidering it as a temporary capture, yet like the caſe of a capture and recapture, the mariner was ſtill entitled to his wages; for a mariner's title to wages depends on the ſhip's earning her freight for the voyage,

(*l*) 3 *Bos. & Pul.* 405. * 4 *Eaſt Rep.*

and

and the performance of his ſtipulated duty; and here freight for the voyage was ultimately earned, and the mariner was guilty of no breach of duty; for his ſtipulation *not to be on ſhore under any pretence, without leave, before the voyage was ended*, muſt be underſtood of being on ſhore *by the party's own unauthorized act*. And even if ſuch impriſonment on ſhore could be conſidered, yet the maſter having afterwards received him again on board without objection, amounted to a diſpenſation of the ſervice in the interval, and entitled him to wages according to his original contract.

6. *In Caſes of Capture and Recapture.*] If a ſhip is captured in the courſe of her voyage, but is afterwards recaptured, and arrives with her crew at the port of delivery, the ſeamen are entitled to their wages. (*m*)

But, if a ſhip ſail to one place in order to take in a cargo there, to be conveyed to another place, and having received the cargo accordingly, be taken before her arrival at the place of delivery, nothing is payable to the ſeamen for navigating the ſhip to the firſt place, becauſe no freight is thereby gained.

Thus, in the caſe of *Hernaman* v. *Bawden*, (*n*) which was an action of *aſſumpſit* for a ſailor's wages on a voyage to *Newfoundland*, for fiſh, and from thence to *Spain* or *Portugal*. The ſhip received her cargo at *Newfoundland*, but was taken by the enemy before her arrival at her port of delivery. It was determined that the plaintiff could recover no part of his wages; for as the freighter loſt his cargo, ſo the mariner ought to loſe his wages.

So, in the inſtance of capture and recapture, if the ſeamen are thereby ſeparated and detained from the ſhip, which afterwards earns her freight without them, it ſeems doubtful whether they are entitled to their wages for the period of detention. For though in the caſe of *Pratt* v. *Cuff*, (*o*) which was tried before Lord *Kenyon*, wherein the maſter of a veſſel, which had been captured and reſtored, claimed his wages for the period of deten-

(*m*) Bergſtrom v. Mills, 3 *Eſp. Rep.* 36. *But ſee Abbott*, 411, 412. *As to the ſailors liability to contribution for ſalvage.*

(*n*) 3 *Bur.* 1844. (*o*) *Cited in* Thomſon v. Rowcroft, 4 *Eaſt Rep.* 43.

tion, although he had during that time been ſeparated from the veſſel, the ſhip having afterwards earned her freight, the wages for the voyage, excluſive of that period, were paid without diſpute; and the defendant is reported to have acquieſced under a verdict given againſt him for the further ſum, by reaſon of a ſtrong opinion expreſſed by his lordſhip at the trial in favor of the claim. Yet in the caſe of a mariner (*p*) who had engaged for a voyage from *Newcaſtle* to *London* and back, and was captured with the ſhip two days after her departure, and taken out of her by the captors and ſent to *France*, and who inſtituted a ſuit in the *Court* of *Admiralty* for wages, the ſhip having been retaken, and performed her voyage. The learned judge of that court ſaid, "Nothing is "better ſettled than that the act of capture defeats all rights and "intereſts," and he held, the intereſt of the mariner not to be revived in that caſe, he having been ſeparated from the ſhip, and the owner having been obliged to hire another mariner at *London* to ſupply his place on the return.

7. *Where a Seaman is impreſſed out of a Merchant-Ship, or voluntarily enters into the King's Service.*] Before the paſſing of either of the Statutes, which regulate the ſervice of ſeamen in merchant-ſhips, it was determined, (*q*) that a ſeaman, who was impreſſed from ſuch a ſhip into the king's ſervice, was entitled to receive a proportion of his wages up to the time of impreſſing, the ſhip having afterwards arrived in ſafety at her port of diſcharge. It has alſo been ſince decided, that he is entitled to no more. (*r*) The firſt of thoſe ſtatutes (*s*) expreſsly provides, that a ſeaman belonging to any merchant-ſhip, who enters into the ſervice of his Majeſty on board of any of his Majeſty's ſhips, ſhall not for ſuch entry forfeit the wages due to him during the term of his ſervice in the merchant-ſhip, nor ſhall ſuch entry be deemed a deſertion. It has alſo been decided, that a ſeaman belonging to a privateer, who was to have a certain ſhare of prizes in lieu of wages, and who had engaged to ſerve full ſix months on pain of forfeiting ſuch ſhare, did not loſe his ſhare of a prize taken while he was in the privateer by being afterwards impreſſed, and then

(*p*) *The Friends, Bell*, 4 *Rob. Ad. Rep.* 143. *See alſo Abbott*, 411 *ad* 413.
(*q*) Wiggins *v.* Ingleton, 2 *Ld. Raym.* 1211. *See alſo Abbott*, 391, 5.
(*r*) Clements *v.* Mayborn, *K. B. Trin. Term*, 24 Geo. III. *Abbott*, 395.
(*s*) 2 Geo. II. c. 36. ſ. 13.

accepting

accepting the bounty, and entering on board one of his Majeſty's ſhips before the expiration of the ſix months. (*t*)

8. *Of the Death of a Seaman during the Voyage.*] If a ſeaman falls ſick and dies during the voyage, it appears by ſeveral foreign ordinances, (*v*) that his wages ſhall be apportioned and paid to his repreſentatives. But there is no general deciſion on this ſubject in our law books; though in the caſe of *Cutter* v. *Powell*, (*u*), it ſeems to have been admitted, that the repreſentatives of a ſeaman hired by the *month* would be entitled to a proportion of wages to the time of his death. The facts of the caſe itſelf were very particular, and the deciſion turned upon them. Before the paſſing of the ſtatute which limits the wages to be given to perſons for navigating a ſhip back from the *Weſt Indies* to this country one *Cutter* was hired as ſecond mate on a voyage from *Jamaica* to *Liverpool*; and at *Jamaica*, the maſter ſubſcribed and delivered to him the following note: "Ten days after the ſhip G. P., "myſelf maſter, arrives at *Liverpool*, I promiſe to pay to Mr. *T.* "*Cutter*, the ſum of 30 guineas, provided he proceeds, conti- "nues, and does his duty as ſecond mate in the ſaid ſhip from "hence to the port of *Liverpool*. *Kingſton*, *July* 31ſt, 1793." The ſhip ſailed from *Kingſton* on the 2d of *Auguſt*, and arrived at *Liverpool* on the 9th of *October*. *Cutter* went on board the 31ſt of *July*, ſailed in the ſhip and proceeded, continued, and did his duty as ſecond mate until his death, which happened on the 20th of *September*. It was proved, that the wages uſually paid to a ſecond mate on ſuch a voyage, if hired by the month out and home, were 4*l* *per* month: that when ſeamen were ſhipped by the run from *Jamaica* to *England*, a groſs ſum was uſually given; and that the uſual length of a voyage from *Jamaica* to *Liverpool*, was about eight weeks. The plaintiff was executrix of *Cutter*; and it was contended on her her behalf, that ſhe ought to recover a *proportion of the wages for that part of the voyage that he lived, and ſerved on board the ſhip.* The Court of *King's Bench*, before which this queſtion was brought for deciſion, directed inquiry to be made as to the uſage among merchants, &c. in caſes of this kind; but no ſatisfactory information being obtained as to the uſage, although ſuch notes had been often given, the court,

(*t*) Paul v. Eden, *K. B. Eaſt Term*, 25 Geo. III. *Abbott*, 395.
(*v*) Vide *Abbott*, 395.
(*u*) 6 *Term Rep.* 320. *See alſo Abbott*, 396.

upon

upon conſideration of the particular terms of the note, and of the great exceſs of the ſum to be paid to *Cutter*, if he had performed the whole voyage according to thoſe terms, above the uſual rate of wages upon a monthly hiring, decided that nothing was payable for the partial ſervice: declaring at the ſame time, that if the plaintiff could have proved a uſage to pay a proportional ſum in ſimilar caſes, their deciſion ſhould have been conformable to the uſage.

Where the captain of a ſhip has accounted upon oath to the collector of the port for a ſum of money, as the wages due to a deceaſed ſeaman, and paid the ſame to *Greenwich Hoſpital*, under the 37 Geo. III. c. 73. the repreſentatives of ſuch ſeamen may ſtill ſue the captain for any wages due beyond the ſum ſo paid.

Thus in the caſe of *Armſtrong*, adminiſtratrix of *Armſtrong*, v. *Smith*, (*w*) which was an action brought by the plaintiff as adminiſtratrix of her huſband, who had been a mate of a *Weſt Indiaman*, and had died on the voyage home, for wages due to him from the defendant as captain of the ſhip upon that voyage.

Upon the trial of this cauſe before Sir *James Mansfield*, Ch. J. it was proved, by acknowledgments of the defendant made to the plaintiff immediately after his arrival from the voyage, in which the plaintiff's huſband died, that 23*l.* were due to him for wages; and the only defence relied on was, that the defendant had within three months, after the arrival of the ſhip, paid into the office of the receiver of the ſix-penny duty for *Greenwich Hoſpital*, under the 37 Geo. III. c. 73. ſ. 7. the ſum of 9*l.* as the arrear of wages due to the deceaſed, and for the uſe of his executor or adminiſtrator. This, it was contended, deprived the plaintiff of her right of action for the wages due to her huſband, the defendant having, according to the directions of the above ſtatute, accounted with *Greenwich Hoſpital*, upon oath, for the amount of the wages due to the plaintiff, and having made himſelf liable to heavy penalties if he had rendered a falſe account. His lordſhip directed the jury to deduct the 9*l.* paid into *Greenwich Hoſpital* to the account of the plaintiff, and to give her a verdict for 14*l.* This was accordingly done, and liberty was reſerved to the defendant to move the court to ſet that verdict aſide, and enter a nonſuit.

(*w*) 1 *New Rep. C. B.* 299.

A rule

A rule was accordingly moved for and obtained: But the court, after argument, determined that the plaintiff was entitled to recover the 14*l.*

Sir *James Mansfield*, Ch. J. said: "The single question in this case is, whether the 37 Geo. III. c. 73 has taken away from the representatives of seamen dying upon a voyage the right of recovering from the captain such wages as remain due to them in their representative character, after allowing to the captain for so much as he has duly paid upon their account to the officer of *Greenwich Hospital?* Nothing is to be collected from the language of the act as to the particular grievance which induced the passing those provisions which apply to this case. On that point we are left in the dark. Representatives of deceased seamen must often not only be very ignorant respecting the amount of wages due to them from captains, but must have ~~must~~ encountered great difficulties in pursuing their remedies against captains who had probably embarked on fresh voyages. To remedy this inconvenience it is provided by the act, that every master of a ship employed in the *West India* trade shall, within 10 days after his arrival out and home, deliver in an account, on oath, of all seamen who have died on the voyage, and within three months after his arrival in any port of *Great Britain* pay to the receiver of the six-penny duty for *Greenwich Hospital* any wages due to any seaman who has died during the voyage, to the use of the representatives of such seamen. It is observable, that in case the master neglects to comply with the directions of the act in the above mentioned respects, he is subjected to two penalties of 50*l.* each, and also to double the amount of the wages due to the deceased seaman; but that the penalties, when recovered, are distributed in the proportions of one-third to *Greenwich Hospital*, one-third to the support of the seamen's hospital, if any there be; and if not, to the disabled seamen of that port and their families, and the remaining one-third to the informer. Of these penalties therefore nothing is reserved for the representatives of the deceased seaman, who have been the actual losers by this neglect or fraud of the master of the ship. That is a strong ground for inferring, that it was not the intention of the legislature to deprive them of their remedy at law for the wages not actually paid to the officer at *Greenwich Hospital*. For it seems probable that the legislature would have given some part of the penalties recovered to the representatives

of the deceaſed ſeaman by way of compenſation for their loſs, if it had intended to deprive them of their right of action for the wages not duly paid in on their account. If the whole of the wages due are faithfully paid in, of courſe the repreſentative of the ſeaman has no longer any right of action for wages; but if a part only be paid in, and the remainder be fraudulently withheld, on what principle is it that the repreſentatives of the ſeamen are to be deemed to be deprived of their right of ſuing for ſuch wages? According to the conſtruction contended for on behalf of the defendant, the maſter of a ſhip may be called upon to pay large penalties, no part of which, nor of the wages remaining unpaid will ever belong to the perſon really injured by the miſconduct of the captain, *viz.* the repreſentative of the ſeaman. It appears to me monſtrous to put ſuch a conſtruction upon an act, which does not contain one ſingle word by which the right of the repreſentative to recover wages not duly accounted for to *Greenwich Hoſpital* is taken away."

9. *Where a Ship does not perform her Voyage in conſequence of her not being Sea-worthy*, &c.] The wages of ſeamen, whether hired by the month or for the voyage, are ſometimes loſt without any fault on their part, and ſometimes forfeited by their miſconduct. The payment of their wages depends on the ſucceſsful termination of the voyage: therefore if by any diſaſter happening in the courſe of the voyage, ſuch as the loſs or capture of the ſhip, the owners loſe their freight, the ſeamen alſo loſe their wages. (*x*)

So, if a ſhip be not ſea-worthy at the commencement of her voyage, and in the courſe of it is forced into port, and the crew are compelled to abandon the voyage; the ſailors cannot recover wages for any part of the voyage: but their remedy is by ſpecial action on the caſe againſt the owners.

Thus, in the caſe of *Eaken* v. *Thom*, (*y*) which was an action of *aſſumpſit* for ſeaman's wages. The defendant was the owner of a ſhip living at *Liverpool*; and had hired the plaintiff to proceed as mate on board the ſhip, on a voyage to *Philadelphia*. The ſhip ſailed on the voyage, but was under the neceſſity of putting into *Cork*, not from any uncommon badneſs of the weather, but

(*x*) Vide *Molloy*, *Book* 2. *ch.* 3. *ſ.* 10. 1 *Sid.* 179. Abernethy *v.* Landale, *Doug.* 539. *Abbott*, 411. (*y*) 5 *Eſp. Rep.* 6.

from

from the circumſtance of the want of ſea-worthineſs in the ſhip; which, on inſpection, was found not to be capable of repairs; ſo that ſhe was condemned and ſold, and the voyage abandoned.

The counſel for the plaintiff admitted that, in common caſes, freight was the mother of wages, and that if the ſhip was loſt the ſailor had no claim: but he contended, that that was the caſe where the ſhip was ſea-worthy, when ſhe ſailed on her voyage, and, unleſs prevented by the common caſualities of the ſea, could have completed her voyage, and the ſeaman earned his wages. The owner, by ſending out a ſhip incapable of performing the voyage, could not defeat the plaintiff's claim to wages where he had been willing to ſerve, and where the voyage was loſt and defeated by reaſon of the defendant's own default, and not through any fault of the plaintiff.

Lord *Ellenborough*, Ch. J. ſaid: "That the caſes had never made the diſtinction contended for by the counſel. The rule of law was general; the ſhip muſt perform her voyage to entitle the ſeamen to recover; and if the owner ſent her out under ſuch circumſtances as were ſtated, it ſhould be the object of a ſpecial action on the caſe: but he was of opinion, that the ſailor could not, on the ground ſtated, recover his wages."

The plaintiff afterwards proved, that when the veſſel was found not to be in a capacity to proceed on the voyage, he was ordered to remain on board until ſhe underwent ſome repair; which he did, and for which he claimed wages.

Lord *Ellenborough* ruled, that this being a new contract, the plaintiff was entitled to recover on that account, as for work and labour.

10. *In Caſes of Embezzlement or Damage of Part of the Cargo.*] If any part of the cargo be embezzled or injured by the fraud or negligence of the ſeamen, ſo that the merchant has a right to claim a ſatisfaction from the maſter and owners, it is obſerved, (z) that they may, by the cuſtom of merchants, deduct the value thereof from the wages of the ſeamen, by whoſe miſconduct the injury has taken place. And that the laſt proviſo

(z) *Abbott*, 418.

introduced

introduced into the uſual agreement ſigned by the ſeamen, is calculated to enforce this rule in the caſe of embezzlement either of the cargo or of the ſhip's ſtores.

But where part of the cargo is plundered during the voyage, but by whom cannot be aſcertained, a ſailor does not, in conſequence of ſuch plunderage, forfeit his wages; nor, as it ſhould ſeem, is he liable to any deduction therefrom.

Thus, in the caſe of *Thompſon* v. *Collins* (*a*) which was an action of *aſſumpſit* for ſeaman's wages. On the trial, a verdict was found for the plaintiff, ſubject to the opinion of the Court of *Common Pleas* on a caſe which ſtated, that on the 19th of *February*, 1803, the plaintiff ſhipped himſelf as a ſailor on board the ſhip *Mentor*, at *Port Maria*, in *Jamaica*, for a voyage from *Jamaica* to *London*, and afterwards ſerved on board the ſhip during the voyage. At the time of his entry he ſigned the articles preſcribed by the ſtatute 37 Geo. III. c. 73. The *Mentor* had ſeveral pipes of Madeira on board, which were ſhipped at *Madeira* on the outward-bound voyage, and ſtowed in the fore-part of the ſhip, and ſecured in the uſual manner by a ſtrong partition of deal boards to prevent the crew from getting to them. When the ſhip ſet ſail from *Jamaica* on her homeward-bound voyage the partition was ſecure. In the courſe of her paſſage from *Jamaica* to *London* the partition was broken down by ſome of the crew, but by whom the ſame was done could not be aſcertained. Six of the caſks were plugged by ſome of the crew, but it was not proved that the plaintiff was concerned in the tranſaction. Upon the landing of the caſks plugged there was found a deficiency in their contents to the amount of 162 gallons. The defendant, the owner, paid all the other men their wages, deducting their proportionable value of the Madeira loſt.

The queſtion for the opinion of the court was, whether the plaintiff was entitled to recover?

The counſel for the defendant argued thus: "The form of agreement, to be entered between the maſter and mariners upon *Weſt India* voyages is expreſsly provided by 37 Geo. III. c. 73. ſ. 11. Whatever conditions, therefore, are to be found in the articles contained in the ſchedule of that act muſt be binding upon

(*a*) 1 *New Rep. C. B.* 347.

the

the parties. At the concluſion of the articles it is agreed 'that each ſeaman and mariner who ſhall well and truly perform the above mentioned voyage (provided always, that there be no plunderage, embezzlement, or other unlawful acts committed on the ſaid veſſel's cargo or ſtores) ſhall be entitled to their wages or hire that may become due to him purſuant to this agreement.' The right to wages, therefore, is ſubject to a condition; and if there be any plunderage or embezzlement, the right to wages is forfeited. The terms of the proviſo, being clear and preciſe, cannot be done away by conſtruction. Many of the marine laws appear at firſt repugnant to juſtice; but they are founded on policy, and have therefore been ſupported. It appears from *Molloy*, book 2. chap. 3. ſ. 9. that if goods are embezzled, the maſter may deduct the amount out of the mariner's wages; for before the mariner can claim his wages out of what the ſhip hath earned, the ſhip muſt be acquitted from the damage that the merchants have ſuſtained by the negligence or fault of the mariners. It is alſo ſaid in *Bellamy* v. *Ruſſel*, 2 *Show.* 167. that there is a cuſtom between the maſter and hired ſeamen to deduct out of their wages what goods are damnified."

The court, however, were of opinion that the plaintiff was entitled to recover.

Sir *James Mansfield*, Ch. J. ſaid: "Whether the defendant in this caſe be entitled to deduct out of the plaintiff's wages his proportion of the embezzlement, in the ſame manner as has been done reſpecting the other ſeamen, might perhaps afford ſome queſtion; but nothing has been tendered, and no money paid into court, and we have only to determine whether the plaintiff be entitled to recover. If, however, the right to a deduction be conſidered as a queſtion of importance, and the defendant will pay into court the reſt of the plaintiff's wages, together with the coſts of this action, I ſhould have no objection to let this caſe ſtand over to next term, in order to conſider further the queſtion of deduction; but in that caſe the defendant muſt pay the coſts of the argument. As to the act of Parliament, nothing can be more unreaſonable than the conſtruction ſet up for the defendant; the words relied upon are 'that each ſeaman and mariner who ſhall well and truly perform the above-mentioned voyage (provided always, that there be no plunderage, embezzlement, or other unlawful acts committed on the ſaid veſſel's cargo or ſtores) ſhall be entitled to their wages or hire that may become

come due to him pursuant to this agreement.' From these general loose words the defendant would contend, that if any goods to the amount of 5*s.* be plundered or embezzled by A., or any unlawful act committed by A., B., and every other sailor on board, shall lose his whole wages. The words, therefore, must be construed respectively to every sailor who shall plunder, embezzle, or commit an unlawful act. There is no foundation, therefore, for a forfeiture of the whole wages; and I suspect that there is as little for a proportionable deduction; for, notwithstanding what is said in *Molloy*, if such be the rule of law, it is scarcely possible but that it must have been often mentioned in our books, and as well known as any rule of maritime law, since frequent occasions must have arisen for the application of it."

II. *Of Desertion.*] Desertion from the ship is held to be a forfeiture of the wages previously earned in all maritime states (*b*); and in conformity to this principle of maritime law, the legislature of this country, by the stat. 11 and 12 W. III. c. 7. s. 17. "for the prevention of seamen deserting of merchant ships abroad in parts beyond the seas," has enacted, "That all *such* seamen, officers, or sailors, who shall desert the ships or vessels wherein they are hired to serve for that voyage, shall, for such offence, forfeit all such wages as shall be then due to him or them." And by the stat. 2 Geo. II. c. 36. s. 3., if a seaman shall desert, or refuse to proceed on the voyage on board any ship bound to parts beyond the seas, or shall desert from the ship to which he belongs, in parts beyond the seas, after he shall have signed the contract, he shall forfeit to the owners the wages due to him at the time of his deserting, or refusing to proceed on the voyage.

By the articles of agreement usually signed in these cases, it is stipulated that the mariner shall not go out of the ship, on board any other vessel, or be on shore under any pretence whatever, without leave; and that in default he shall be liable to the penalties of this act of parliament: but it is observed (*c*) that this stipulation is merely referrible to the statute, and does not create a forfeiture of wages in a case where the statute has not inflicted it; as in the case of leaving the ship after her arrival in a port of this country, although before she is moored. This case is specifically provided

(*b*) *Vide Abbott*, 413. (*c*) *Ibid.* 414.

for

for by the ſecond ſection of the laſt mentioned act, which, after reciting that "ſeamen and mariners, after their ſhip's arrival at their unlivering port in *Great Britain*, oftimes leave the ſhips and veſſels before they are unladen, or before the ſaid ſeamen and mariners are diſcharged by the maſters or commanders of ſuch ſhips or veſſels," enacts, "That in caſe of any ſeaman or mariner, not entering into the ſervice of his *Majeſty*, his heirs and ſucceſſors, ſhall leave ſuch ſhip or veſſel to which he or they belong, before he or they ſhall have a diſcharge in writing from the maſter or commander, or other perſon having the charge of ſuch ſhip or veſſel, he or they ſo leaving ſuch ſhip, or veſſel, ſhall forfeit one *month's* pay to the uſe of *Greenwich* hoſpital."

Although by this clauſe the diſcharge is required to be in writing, yet in an action brought by a ſeaman againſt the maſter for his wages, at the trial whereof it appeared that the plaintiff and ſeveral others left the ſhip under theſe circumſtances, while ſhe was under the command of the mate, and the maſter inſiſted upon his right to make this deduction, but did not call the mate to prove that he had not given a diſcharge in writing, it was held, that the jury might preſume that the plaintiff had received ſuch a diſcharge; this being the caſe of a penalty in which the negative ought to be proved by the party inſiſting on the forfeiture, as the circumſtances of the caſe appeared to afford him the means of doing ſo (*d*).

The ſtatute 2 Geo. II. c. 36. ſ. 9. alſo authorizes the maſter or owner to deduct from the wages due to a mariner all the penalties and forfeitures incurred by the act, *and to enter them in a book to be kept for that purpoſe*, to be ſigned by the maſter and two or more principal officers. Upon this clauſe of the act it has been held, (*e*) that the maſter cannot make this deduction unleſs the forfeiture has been regularly entered in a book, as the ſtatute directs.

With reſpect to ſhips of the burthen of one hundred tons and upwards, employed in the *coaſting trade*, and going to open ſea, it is provided (*f*) that if a ſeaman, having ſigned the requiſite agreement, neglects or refuſes to proceed on the intended voyage, he

(*d*) Frontine *v.* Froſt, 3 *Bos. & Pul.* 302. (*e*) *Ibid.*
(*f*) 31 *Geo.* III. *c.* 39. *ſ.* 3. & 4. *ſee alſo Abbott*, 416.

forfeits to the owner *all* the wages due to him at the time; but the forfeiture for deſertion afterwards, and before the voyage or voyages agreed upon, or upon which ſuch ſhip ſhall have proceeded, ſhall be completed, and the cargo of ſuch ſhip delivered, or before the ſeamen ſhall have a diſcharge in writing from the maſter, &c. is only of *one month's* wages to the uſe of *Greenwich* hoſpital.

In *all* caſes a ſeaman who wilfully abſents himſelf from the ſhip without leave, forfeits to the uſe of *Greenwich* hoſpital *two days'* pay for each day's abſence (*g*).

In the *coaſting trade*, the ſtatute 31 Geo. 3. c. 39. ſ. 9. directs, that if a ſeaman is hired by the voyage, and the period of the voyage agreed upon exceeds one *lunar* month, the forfeiture of one month's pay ſhall be accounted a forfeiture of a ſum of money bearing the ſame proportion to the whole wages as a lunar month ſhall bear to the whole period of the voyage; and that the forfeiture of two days' pay ſhall be computed in the ſame manner. If the whole period of the voyage does not exceed one lunar month, the forfeiture of one month's pay is to be accounted a forfeiture of the whole wages contracted for: and the like as to the forfeiture of two days' pay, if the voyage does not exceed two days.

In addition to this forfeiture of wages earned by ſervice in the ſhip from which a ſeaman deſerts, the legiſlature, by ſtat. 37 Geo. III. c. 73. ſ. 1. has further puniſhed deſertion from a *Britiſh* ſhip in the *Weſt Indies* with forfeiture of *all* the wages to which he might otherwiſe be entitled for the voyage made in the ſhip *on board of which he ſhall enter immediately after ſuch deſertion.*

We have already ſeen (*h*) that entry into the ſervice of his Majeſty is not deemed a deſertion, nor followed by the forfeiture of wages.

The legiſlature has alſo puniſhed with the forfeiture of wages the offence of neglecting or refuſing to aſſiſt the maſter in defending the ſhip againſt the attack of pirates (*i*). It ſeems alſo that

(*g*) 2 *Geo* II. *c.* 36 *ſ.* 5. & 31 *Geo.* 3. *c.* 39. *ſ.* 4.
(*h*) *Vide ante, page* 376. (*i*) 22 *and* 23 *Car.* 2. *c.* 11. *ſ.* 7.

neglect

neglect of duty, disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during the voyage, will also deprive the seaman of his wages (*k*).

But in the case of *Sigard* v. *Roberts*, (*l*) which was an action of *assumpsit* for seaman's wages against the defendant, as captain of the ship *Elizabeth*, on a voyage from *Hamburgh* to *Tranquebar*, from *Tranquebar* to any port the captain should think proper; and from thence to the port of *Hamburgh*, or any other port of delivery.

The plaintiff signed articles, and sailed on the voyage to the *Isle of France*, where she took in a cargo of coffee, sugars, &c. for *Hamburgh*, and was proceeding on her voyage, when she was met, on the 29th of *March*, 1799, in the *North Seas*, by his Majesty's ship the *Lord Duncan*, and taken and brought into the *Downs*, and libelled in the Court of *Admiralty* as enemy's property.

It was given in evidence for the plaintiff, that he had come on shore with a boat from the ship, accompanied by the second mate and the surgeon; that he had remained on shore: but it appeared that he and the other seamen, on being required to get on board, said they had no victuals the whole of the day, and only requested to stay till they had some; and that, being then left on shore, they had gone to the ship the next morning, when the defendant refused to receive them, and dismissed them, refusing to pay them their wages, and desiring them to go to *Hamburgh* and seek them.

The counsel for the defendant rested their defence, 1st. on the clause in the articles by which the crew were to serve on the voyage, above stated, and back to *Hamburgh*, or wherever else the port of delivery should be; that the ship not having arrived at *Hamburgh*, or at any other port of delivery, the action was not maintainable until either of those events took place. 2dly, That by the seventh clause in the articles, no seaman was to demand any money of the captain, but to be content with the wages he had received in advance, until the voyage was ended, the cargo unloaded, and the ship cleared and brought into the proper moorings, under penalty of six marks; so that this was a bar to the

(*k*) 2 *Rob. Adm. Rep.* 261. *Abbott*, 418. (*l*) 3 *Esp. Rep.* 71.

plaintiff's recovery in this country. 3dly, That this was a deſertion, by which the ſeaman forfeited his wages, under the laſt clauſe in theſe articles.

Lord *Eldon*, Ch. J. ſaid, "By the laſt clauſe in theſe articles, deſertion is a forfeiture of wages; the law would have held the ſame language: the principal queſtion, therefore, here is, Is this a deſertion? The defendant undertakes to prove that it is; but, from the circumſtances of the caſe, I am of opinion that it is not: the plaintiff and the other ſeamen only requeſted to be permitted to remain on ſhore to have ſome victuals; it was a reaſonable requeſt; they had no intention of abandoning the ſhip: they, in fact, went on board as ſoon as they had the means, and were refuſed to be received. After thus offering to return to their duty, the captain ſhall not be permitted to call ſuch conduct a deſertion, when the whole conduct of the plaintiff ſhowed that no ſuch was intended."

"The ſecond queſtion ſet up by the defendant is, that the wages, if any are due, are recoverable at *Hamburgh* only; and it is therefore contended that the captain cannot be ſued in a foreign court of juſtice. It is a very wholeſome proviſion, and it may be right law, that if a ſhip is captured, and the maſter and ſailors all diſmiſſed by the force of third perſons, ſuch clauſe ſhould be effectual; but the queſtion is, has the plaintiff a right to ſue *here?* In this caſe the captain diſcharges the ſailor. I ſhould be ſorry to ſtate, that when the captain diſcharges the ſeaman, ſuch ſeaman has not a right to ſue for his wages. The ſeventh clauſe does not contain an expreſs prohibition to ſue in any country, when the voyage is ended: this clauſe therefore cannot prevent the ſailors ſuing for their wages, when the maſter diſcharges them; the voyage then is ended as to the man who is diſcharged from the ſhip."

Of the Time and Place of Payment of Wages.

By the articles of agreement annexed to the ſtatute 37 Geo. 3. c. 73. made for preventing the deſertion of ſeamen from ſhips trading to the *Weſt Indies*, and which are in common uſe for other voyages alſo, it is ſtipulated, that the ſeamen ſhall not demand,

or be entitled to any part of their wages until the arrival of the ſhip at the intended port of diſcharge, and delivery of her cargo, nor in leſs than *twenty days*, if they are not employed in ſuch delivery. The port of diſcharge here mentioned ſeems, by the form of the articles, to be the *foreign port to which the outward bound cargo is deſtined*; but Mr. *Abbott*, in his treatiſe on this ſubject (*m*), conceives it to be meant of the *port of diſcharge and delivery at the ſhip's return to this country*; for, he obſerves, unleſs the voyage and ſtipulated ſervice of the ſeamen terminate at the foreign port, only *half* the wages then due can be paid there; the legiſlature having enacted as a general law (*n*), "that no maſter or owner of any merchant ſhip, or veſſel, ſhall pay or advance, or cauſe to be paid or advanced, to any ſeaman or mariner, during the time he ſhall be in parts beyond the ſeas, any money or effects, upon account of wages, exceeding *one moiety* of the wages which ſhall be due at the time of ſuch payment, until ſuch ſhip or veſſel ſhall return to *Great Britain*, or *Ireland*, or the *Plantations*, or to ſome other of his Majeſty's dominions, whereto they belong, and from whence they were firſt fitted out; and if any ſuch maſter or owner of ſuch merchant ſhip, or veſſel, ſhall pay or advance, or cauſe to be paid or advanced, any wages, to any ſeaman or mariner, above the ſaid moiety, ſuch maſter or owner ſhall forfeit and pay *double* the money he ſhall ſo pay or advance, to be recovered in the *High Court of Admiralty*, by any perſon who ſhall firſt diſcover and inform of the ſame."

And by the articles of agreement preſcribed by the ſtatute 39 Geo. III. c. 80. made to regulate the manner of carrying ſlaves in *Britiſh* ſhips from the coaſt of *Africa*, the maſter engages "to pay one month's pay after the landing of the ſlaves in the *Weſt Indies*, or *America*, ten days before the ſailing of the ſhip on her homeward-bound paſſage." And the officers and mariners engage "not to demand their wages, or any part thereof, except the value of the *fourth* part of their wages, to be ſupplied in ſlops or other neceſſaries, and one month's pay with their ſhort allowance money then due in the *Weſt Indies*, or *America*, until the ſhip's arrival at her delivering port, * except they ſhall be im-

(*m*) *p.* 405. (*n*) 8 *Geo.* I. *c.* 24. *ſ.* 7. *made perpetual by* 2 *Geo.* 2. *c.* 28. *ſ.* 7. *See alſo* 2 *Geo.* II. *c.* 30. *ſ.* 12.

* *This appears, by the articles, to be a delivering port in* Europe, Vide *Abbott*, 406. *note* (*l*).

preſſed, or enter on board any of his Majeſty's ſhips, or be diſcharged by mutual conſent, agreeable to the certificate ſpecified in the act." (*o*)

By the articles of agreement for ſervice in a *Dutch* ſhip, which were proved in evidence in the caſe of *Gienar* v. *Meyer* (*p*), it was ſtipulated, that in caſe one or more complete voyages ſhould be made out of the country, the maſter ſhould, at every *ſecond* place of delivery, ſecure to the ſeamen *two thirds* of their wages, by an order on his purſer or correſpondent at *Rotterdam*; but that none of the ſeamen ſhould inſtitute any ſuit againſt the maſter in foreign countries.

By the articles of agreement made at *Altona*, for ſervice in a *Daniſh* ſhip, which were proved in the like manner at another trial (*q*), it was ſtipulated that no one ſhould demand any money, while abroad, from the maſter; but every one ſhould content himſelf with the money received upon hand, until the completion of the voyage, to the ſatisfaction of the maſter and his owners, and until ſuch time as the ſhip ſhould have arrived at *Altona*; and it ſhould at all times be at the option of the maſter to give them money while abroad or not.

By the law of *America* a ſeaman is entitled to receive one third of his wages due to him at every port where the ſhip unlades and delivers her cargo, before the voyage is ended, unleſs the contrary is expreſsly ſtipulated in the contract (*r*).

As to ſhips engaged in *foreign voyages*, it is enacted by the ſtat. 2 Geo. II. c. 36. ſ. 7. that, upon the arrival of any ſhip in *Great Britain*, from parts beyond the ſeas, the maſter or commander ſhall be obliged to pay the ſeamen thereunto belonging their wages, if demanded, in *thirty days* after the ſhip's entry at the cuſtom-houſe, except in caſe where a covenant ſhall be entered into to the contrary, or at the time the ſeamen ſhall be diſcharged, which ſhall firſt happen, if demanded, deducting the penalties and forfeitures

(*o*) *Abbott*, 405, 6 (*p*) 2 *H. Bl.* 603. *In conſequence of the concluding clauſe of theſe articles, it was held that an action for wages could not be maintained, although the veſſel had been ſeized by an Engliſh ſhip, brought into this country, and ſold here, under the authority of the Government, the maſter and crew not being made priſoners.*

(*q*) Hull v. Heitman, *at* Guildhall *Sitt. after* Mich. *Term*, 1801. *Abbott*, 408. (*r*) *Ibid.*

impoſed

impoſed by the act, "under penalty of paying to each ſeaman, or mariner, that ſhall be unpaid, contrary to the intent and meaning of this act, *twenty ſhillings* over and above the wages that ſhall be due to each perſon, to be recovered by the ſame means and methods as the wages may be recovered; and ſuch payment of wages aforeſaid ſhall be good and valid in law, notwithſtanding any action, bill of ſale, attachment or incumbrance whatſoever."

And as to ſhips employed in the *coaſting trade*, in the manner before mentioned, it is enacted, by the ſtat. 31 Geo. III. c. 39. ſ. 5., "that the maſter, commander, or perſon having charge of the ſhip, ſhall be obliged to pay the ſeamen their wages, if demanded, within *five days* after the ſhip ſhall be entered at the cuſtom-houſe, or the cargo be delivered, or at the time the ſeamen ſhall be diſcharged, which ſhall firſt happen, unleſs an agreement ſhall have been made to the contrary, in which caſe the wages ſhall be paid according to ſuch agreement, deducting in every caſe the penalties impoſed by this act, under the like forfeiture of *twenty ſhillings*, to be recovered in the ſame manner as with regard to ſhips coming from abroad; and ſuch payment ſhall be good in law, notwithſtanding any action, bill of ſale, attachment, or incumbrance whatſoever."

As to ſhips employed in the *ſlave trade*; it is enacted, by the ſtat. 39 Geo. III. c. 80. ſ. 34. that upon the arrival of every ſhip at her diſcharing port in *Great Britain*, the officers and ſeamen therein ſhall be continued in *full* pay and proviſions, until the ſhip is cleared inwards, or their accounts are ſettled and paid. But no time of payment being mentioned in the body of this ſtatute, or in the articles annexed to it, Mr. *Abbott* (*s*) conceives the general rule before mentioned, with reſpect to ſhips coming from abroad, applies to ſhips engaged in this trade alſo.

Of the Remedy for the Recovery of Wages.

Seamen, in ordinary caſes, have a threefold remedy for the recovery of their wages, *viz.* againſt the ſhip, the owners, and

(*s*) *Page* 410.

the maſter; (*t*) the maſter whether appointed to that office at the commencement, or ſucceeding to it in the courſe, of the voyage, can only ſue the owners perſonally in a Court of *Common Law*. But as he generally receives the freight and earnings of the ſhip, and may pay himſelf out of the money in his hands, he has not often occaſion for the aid of a Court of Juſtice to obtain his right. (*v*) He has not, however, any lien on the ſhip for wages, or money paid for ſtores or repairs done in *England*. (*u*)

The ſuit of the ſeamen in the Court of *Admiralty* is ſaid (*w*) to be frequently ſpoken of as an excepted caſe, and an indulgence granted to them on account of the convenience and advantage of proceeding in a court, in which all may join in one ſuit, and payment may be obtained out of the value of the ſhip; and of the preſumption that they, who contract with the maſter, contract with him on the credit of the ſhip: whereas the maſter, who contracts with the owners, is preſumed to truſt to their *perſonal* credit.

In purſuance of this diſtinction between the remedies of the ſeamen and the maſter, it is now ſettled, (*x*) that if the hiring be on the uſual terms, and made by word, or by writing only without ſeal, the ſeamen, or any one or more of them, and every officer, except the maſter, may ſue in the Court of *Admiralty*; and may, by the proceſs of that court, arreſt the ſhip as a ſecurity for their demand, or cite the maſter or owners *perſonally* to anſwer to them. And the ſeamen may ſue there not only for the wages earned in the courſe of the voyage, but for thoſe earned in rigging and fitting out a ſhip for a voyage on which they have engaged to proceed, if the owners do not afterwards think proper to ſend the ſhip on the intended voyage. (*y*) And it ſeems alſo that they may ſue there for the wages contracted to be paid to them for navigating a ſhip from one port of this country to another. (*z*)

In proceeding againſt the ſhip in ſpecie, if the value thereof be inſufficient to diſcharge all the claims upon it; the ſeamen's claim for his wages is preferred before all other charges, for the ſame

(*t*) *Abbott*, 421. (*v*) *Ibid.* (*u*) Wilkins *v.* Carmichael, *Doug.* 101.
(*w*) *Ibid.* (*x*) Vide *Abbott*, 421, 422.
(*y*) *Ibid.* 422. (*z*) *Ibid.*

reaſon

reaſon that the laſt bottomry-bond is preferred to thoſe of an earlier date: the labour of the ſeamen, having brought the ſhip to the deſtined port, has furniſhed to all other perſons the means of aſſerting their claims upon it, which otherwiſe they could not have had. (*a*)

In the Courts of *Common Law* the ſeamen may ſue either the maſter, as the perſon immediately contracting with them, and anſwerable to them, or the owners, as the perſons virtually contracting with them through the agency of the maſter, and anſwerable for the performance of his engagement. And in ſuits in the courts of *common law* the form of action depends upon the nature of the contract: if the contract be under ſeal, an action of *debt* or *covenant* muſt be brought; if it be not under ſeal, an action of *debt* or of *aſſumpſit*. If, however, ſhip's articles are put under ſeal, but by the articles they are expreſſed to be under hand only, and it appear clearly not to have been the intention of the parties to enter into a ſealed inſtrument, an action of *aſſumpſit* for wages will lie. (*b*)

The contract, whatever be its form or nature, always remains in the poſſeſſion of the maſter or owners; and the ſtatutes (*c*) expreſsly ordain, that where it becomes neceſſary to produce the contract in court, no obligation ſhall lie on the ſeamen to produce it, but on the maſter or owners of the ſhip, and that no ſeamen ſhall fail in any ſuit or proceſs for the recovery of wages for want of the production of it.

In the *fiſhing trade*, particularly in the *whale fiſhery*, the ſeamen uſually ſerve under an engagement to receive a certain proportion of the profits of the adventure. Such an engagement is ſaid (*d*) to be rather in the nature of a partnerſhip than of a contract of hiring and ſervice; in which caſe the ordinary remedy for their reſpective ſhares could only be by bill in *Chancery*; it being a general rule, that one partner cannot maintain an action at law againſt his co-partner for a moiety of their joint-ſtock and profits in trade.

But in the caſe of *Wilkinſon* v. *Fraſer*, (*e*) it was ruled by Lord *Alvanley*, Ch. J. at *niſi prius*, that if a ſailor engages on a

(*a*) Vide *Abbott*, 430. (*b*) Clement *v.* Gunhouſe, 5 *Eſp. Rep.* 83.
(*c*) 2 Geo. II. *c.* 36. *ſ.* 8. 31 Geo. III. *c.* 39. *ſ.* 6. (*d*) *Abbott*, 382.
(*e*) 4 *Eſp. Rep.* 182.

whaling

whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, he may, after the ſale of the cargo, maintain an action for his wages againſt the captain, and ſhall not be conſidered as a partner. And his lordſhip obſerved, "That the ſhare was in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the ſale of the oil, which had taken place: and that he ſhould not therefore conſider them as partners, but as entitled to wages to the extent of their proportion in the produce of the voyage."

For more concerning owners and maſters of ſhips vide poſt, *part* III. *tit.* "Bailment of Goods," &c.

CHAPTER

CHAPTER VIII.

Of Contracts and Agreements with Parish Officers.

CHURCHWARDENS *de facto*, may maintain an action against former churchwardens, for money received by them for the use of the parish, though the validity of the election of the plaintiffs to the office be doubtful, and though they be not the immediate successors of the defendant.

Thus, in the case of *Turner* and another v. *Baynes*, (*a*) which was an action of *assumpsit* by the churchwardens of the parish of *Stow Market* in *Suffolk*, against a former churchwarden. The usuage of the parish had been for the vicar to choose one churchwarden, and the parishioners the other. But disputes having arisen, both the plaintiffs were chosen by the parishioners at *Easter*, 1794, and continued in office till *Easter*, 1795; during which time, *viz.* in *Hilary* Term, 1795, the action was brought against the defendant, who had been churchwarden from *Easter* 1790 to *Easter* 1791, and who had admitted a sum of money to be in his hands, on the balance of his accounts at *Easter*, 1791, when he went out of office.

The first count of the declaration was, for money had and received *to the use of the plaintiffs as churchwardens*, and the promise to them as churchwardens. The second, for money had and received *to the use of the inhabitants of the said parish of Stow Market*, and the promise to the plaintiffs as churchwardens. The third, on an account stated with the plaintiffs as churchwardens, of money owing from the defendant to them as churchwardens, and the promise accordingly. The fourth on an account stated with the plaintiffs as churchwardens, of money owing from the de-

(*a*) 2 *H Blac.* 559. *Vide* Bishop *v.* Eagle, 10 *Mod.* 22. *and Bac. Abr.* tit. Churchwardens, *E.*

fendant

fendant *to the inhabitants of the ſaid pariſh*, and the promiſe to the plaintiffs as churchwardens, and the breach was laid *to the damage of the inhabitants of the ſaid pariſh.*

At the trial, before Mr. Juſtice *Aſhhurſt* at the *Suffolk* aſſizes, the plaintiffs were nonſuited, chiefly on two grounds: 1ſt, That they were not duly appointed chuchwardens; and 2dly, That they were not the immediate ſucceſſors of the defendant in the office.

But upon a motion for a new trial the Court of *Common Pleas* ſaid: "They were very clearly of opinion that the action was maintainable by the plaintiffs, on both the grounds taken in the argument; that being admitted, and ſworn into the office, and acting as churchwardens, the defendant who was a wrongdoer, in withholding the money, ſhould not be permitted to deny their right to bring the action; and that churchwardens being a corporation for the purpoſe of taking care of the goods of the church, the right to ſue for money withholden from the pariſh paſſed from one ſet to the other, it being perfectly immaterial, whether the immediate or any other ſucceſſors of the defendant brought an action which was not founded in privity between them."

Churchwardens when choſen are a corporation; and, as ſuch, they are ſaid (*b*) to be morally competent to aſſent to a reaſonable contract or agreement beneficial for the pariſh; and thereby to bind the pariſhioners and their ſucceſſors, and alſo ſucceeding churchwardens.

Thus, (*c*) an agreement made by the churchwardens of a pariſh, that the five o'clock bell in the morning ſhould not be rung; in conſideration whereof the parties, inconvenienced thereby, covenanted with the churchwardens to erect a new cupola clock and bell; the Court of *Chancery* decreed a ſpecific performance of the agreement by an injuction, not to ring the bell during the lives of the parties who had erected the cupola, &c. purſuant to the agreement.

(*b*) *Powell on Contracts*, 114.
(*c*) *Dr.* Martin *v.* Nutkin, 2 *P. Wms.* 266.

2. *Of*

2. *Of Contracts with Overseers of the Poor respecting the Maintenance, &c. of Paupers.*

An action (*d*) was brought by an apothecary against the overseers of a parish for the cure of a pauper, who boarded with her son out of the parish, under an agreement made with him by the defendant *Turner*, who was the only acting overseer of the parish. The pauper was suddenly taken ill, and her son called in the plaintiff who had attended her for four months, and cured her. After the cure *Turner* was applied to, and promised to pay the plaintiff's bill. It was held, that though there was no precedent request from the overseers, yet the promise was good, notwithstanding the statute of frauds; for overseers are under a moral obligation to provide for the poor. 2dly, That as *Turner* was the only acting overseer, the other was bound by his promise.

But the law will not raise an *implied* promise by the overseers, &c. of a parish where a pauper is settled, to reimburse the money laid out by another parish in which he happened to be in, for providing him with necessary medical assistance, &c.

Thus, in the case of *Atkins* and others v. *Banwell* and another, (*e*) which was an action of *indebitatus assumpsit*, brought by the plaintiffs as the parish officers of *Toddington* in the county of *Bedford*, against the defendants, as the parish officers of *Milton Bryant* in the said county, to recover 14*l.* 12*s.* for money paid, laid out, and expended by the plaintiffs for meat, drink, board, lodging, medicines, medical assistance, and other necessaries, found and provided by them for one *John Mitchell*, his wife and family. At the trial a verdict was found for the plaintiffs, subject to the opinion of the court on the following case:

"The plaintiffs are the parish officers of *Toddington*, and the defendants are the parish officers of *Milton Bryant*. *John Mitchell* was a pauper legally settled at the time of his illness and death hereafter mentioned, in *Milton Bryant*, but resided with his wife

(*d*) Watson *v.* Turner *and another*. *Sitt. Trin.* 7 Geo. III. *Bul. N. P.* 129. (*e*) 2 *East R.p.* 505.

and

and family at *Toddington*, and was there ſuddenly attacked with dangerous illneſs, which prevented his being moved from the place of his reſidence to that of his ſettlement without endangering his life. The plaintiffs gave notice to the defendants of the illneſs of their pauper within two or three days after the pauper was ſo taken ill. The pauper's illneſs continuing, he afterwards, and about three weeks from ſuch notice, died of ſuch illneſs in the pariſh of *Toddington*; and the plaintiffs, as pariſh officers of that pariſh, from the time of ſuch notice up to the pauper's death, laid out 14*l.* 12*s.* as well for neceſſaries for the pauper and his family, as for medicines and medical aſſiſtance for the pauper, and alſo on the funeral of the pauper after his death. The preſent action was brought to recover that ſum. The jury found that there was no expreſs promiſe of the defendants to pay it to the plaintiffs. The queſtion for the opinion of the court was, whether ſuch action be maintainable in law? If the court ſhould be of that opinion, then the verdict for the plaintiffs was to ſtand; if not, a nonſuit to be entered."

The court were of opinion, that this action was not maintainable: And Lord *Ellenborough*, Ch. J. ſaid, "A moral obligation is a good conſideration for an *expreſs* promiſe, as was held in the caſe of *Watſon* v. *Turner*; (*f*) but it has never been carried further, ſo as to raiſe an implied promiſe in law. There is no precedent, principle, or colour for maintaining this action."

Pariſh officers are bound to take care of caſual poor; and if a perſon, not a pariſh officer, takes care of a perſon coming within that deſcription, and for whom the pariſh officers would be liable to provide, he has a right to recover againſt them the expences incurred on ſuch an occaſion.

Thus, in the caſe of *Simmons* v. *Wilmott* and others, (*g*) which was an action of *aſſumpſit* againſt the defendants as churchwardens and overſeers of the poor of the pariſh of *Iſleworth*, for meat, drink, lodging, medicine, attendances, &c. found and given for one *Thomas Shaw*. The caſe in evidence was that *Shaw*, who was carter to a Mr. *Willan*, reſiding at *Mary-le-bone Park* (not within the pariſh of *Iſleworth*)

(*f*) *Ante* 397. (*g*) 3 *Eſp. Rep.* 91.

had

had been thrown from the cart, within the parish of *Isleworth*, and severely bruised; so much so as to render it unsafe to remove him. He was brought to the plaintiff's house, where he was kept and attended for ten days, until he recovered. It was also proved, that when *Shaw* was brought to the plaintiff's house, he (the plaintiff) sent to one of the overseers, to inform him of it; the overseer directed the person who brought the message, to go to the beadle, and also desired him to assist in taking care of the man. It appeared that *Shaw* was a weekly servant to Mr. *Willan*; and that after he had recovered, the plaintiff applied repeatedly to Mr. *Willan*, to pay him for the expences incurred in taking care of *Shaw*; and sent him in a bill amounting to 8*l.* 18*s.* 6*d.*; Mr. *Willan* offered him 5*l.* 5*s.*, which he refused to take; and he then applied to the parish officers, and sent in a larger bill to them: it also appeared, that after the man had recovered, the vestry had made an order, stating, "That as an encouragement to humanity, they had ordered *Simmons* five guineas; but at the same time, protested against their liability to reimburse him for the expences incurred, knowing *Shaw* to be a servant of Mr. *Willan*, and conceiving Mr. *Willan* liable; and the five guineas was merely voted as a voluntary donation or reward for his humanity. This sum the plaintiff also refused to accept, and brought this action against the defendants as parish officers, for all the expences incurred.

Lord *Eldon*, Ch. J. said: "The questions in this case are, 1st, Whether *Simmons* in point of law, has a demand against the parish officers, either from the liability imposed upon them by law to take care of casual poor, or by express agreement? and, 2dly, Whether, having such demand, he has relinquished it, and bound himself to adhere to the demand he first made against *Willan* as the master of *Shaw*? The case is new to me. It has been decided, (*h*) that if a servant in husbandry has received relief from the parish officers, they cannot recover it against the master, as not being of that description of servants for whom the master is bound to provide; but that if he was of that description the parish officers could recover. Lord *Kenyon* has ruled, (*i*) that when a servant, living under the roof of his master falls sick, the master

(*h*) *Ante*, 230. (*i*) *Ibid.*

is

is liable for medicines provided for the servant, if his illness has not been the consequence of his own misconduct or debauchery. If *Shaw* had been a servant of that description, *Willan* would have been liable; but it does not follow that, because *Willan* might be liable, the parish officers are thereby excused. It comes to this point, was the person relieved within the description of casual poor? if he was, the parish officers are bound to take care of him: a common person would not; but if a common person does take care of him, on the liability of the parish officers, I think he has a right to recover against them.

With respect to the application, in the first instance, to *Willan*, the plaintiff might have reasoned thus: 'I will try to get the money from *Willan*, in order to relieve the parish.' That alone will not discharge the parish officers; there must have been some express abandonment of his claim against the plaintiffs, and an admission that he would look to *Willan* alone. He has acted imprudently, perhaps wrong, in sending in a bill to the parish officers larger than the one he sent in at first to *Willan*; and he must be bound by the first bill; but even if the jury should think 8*l.* 18*s.* 6*d.* too much, and that five guineas is sufficient; if under all the circumstances, and the law as I have stated it, the jury should be of opinion that the parish officers are liable, I think they must give a verdict for five guineas, notwithstanding the order of vestry; for I do not think the order of vestry, protesting against their liability, and offering it as a voluntary kindness, can be considered as a tender of so much."

3. *Of Contracts with Parish Officers respecting the Maintenance, &c. of Bastard Children.*

The statute 6 Geo. II. c. 31. only authorizes parish officers to take security from the putative father of a bastard child to *indemnify* the parish; and therefore where they had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum, as the amount of the charge actually sustained by the parish, which tender was found for the defendant; the court held, that the plaintiffs could not recover further upon the note.

(*k*) 6 *East Rep.* 110.

Thus,

Thus, in the caſe of *Cole* and others v. *Gower* and *Piggott*, (*k*) which was an action of *aſſumpſit* on a promiſſory note for 6*l.* The defendants pleaded *non aſſumpſit* as to all but 5*l.* and a tender of that ſum. The facts were ſhortly theſe: On the 22d of *January* 1803, one *Mary Taylor*, ſingle woman, being a pauper of the pariſh of *Pulloxhill*, ſwore a baſtard child (of which ſhe was then pregnant) to *Gower*, one of the defendants, who was apprehended under a warrant. Shortly after his arreſt he offered to compromiſe the affair with the pariſh, and to pay the defendants (the pariſh officers) 20*l.* if they would give him time; and they agreed to take the 20*l.* which was to be paid by three inſtalments, to be ſecured by three joint promiſſory notes of the defendants, to bear date reſpectively the 8th of *April*. The firſt (whereon the preſent action is brought) at two months date for 6*l.*; the ſecond at twelve months for 7*l.*; the third at twenty-four months for 7*l.* The three notes were accordingly prepared and executed. The firſt note became due on the 11th of *June* 1803, and on the 17th of the ſame month *Mary Taylor*, the pauper, was delivered of a ſtill-born baſtard child in the pariſh of *Pulloxhill*. And the defendants being called upon to diſcharge their firſt note, tendered 5*l.* in part payment of it, but refuſed to pay the remaining 20*s.*, urging that 5*l.* was the full extent to which the pariſh had been damnified. The defendants, at the trial, proved their plea of tender of the 5*l.*; and the plaintiffs did not make out in evidence, that the pariſh had been damnified to above the amount of 5*l.* but on the contrary, that they had only expended 3*l.* 14*s.* by reaſon of the premiſes. The queſtion for the opinion of the court was, whether the plaintiffs were entitled to recover.

The court determined, that the plaintiffs were not entitled to recover more than the ſum paid into court.

Lord *Ellenborough*, Ch. J. ſaid: "I am of opinion that the plaintiffs are not entitled to recover beyond the ſum paid into court, whether conſidering the contract as void upon principles of public policy, or conſidering it with relation to the individuals with whom it was made, as a contract for gain or loſs by perſons cloathed with a public truſt, upon the ſubject matter of their

(*k*) 6 *Eaſt Rep.* 210.

truſt, and giving them an intereſt in the mal-execution of it. It is a ſhocking conſideration that by means of ſuch a ſecurity as this the pariſh officers, who have a public duty impoſed upon them to take care that the father ſhall make a proper proviſion for the maintenance of the child, acquire an intereſt that the child ſhould live as ſhort a time as poſſible. In the caſe, even of a private truſtee, the Court of *Chancery* will not permit him to become a purchaſer of an eſtate which he is entruſted to ſell, becauſe it gives him an intereſt to leſſen the purchaſe money. Conſidering the ſecurity, as given to the pariſh officers only in their individual capacity, it is giving them a temptation to deal with negligence, at leaſt, in that moſt important truſt, the care of children of tender age, which is committed to them. But if made to them in their repreſentative character, and the pariſh were to receive the benefit of the money when recovered, which was the manifeſt intention of the parties, it is placing pariſh officers in a ſituation which the Legiſlature did not mean to do, and which public policy forbids. The law did not mean to make this a matter of ſpeculation of loſs or gain to the pariſh: it is ſaid, that the ſecurity ſhall be given to them in order to *indemnify* the pariſh. I therefore conſider the law as having ſpoken upon the ſubject; and it having ſaid, that the ſecurity ſhall be taken for an indemnity, it has excluded every other conſideration. The pariſh officers are not to ſpeculate, but to take the ſecurity, as a matter of public duty, in the form preſcribed by the act: and taking it in the form they have done is contrary both to the direct letter and to the general policy of the law."

Lawrence, J. ſaid: "I agree with the reſt of the court upon the conſtruction of the ſtatute, though I confeſs I have had ſome doubt upon the inexpediency of the practice which has prevailed; for it may often happen that the putative father may be able to procure friends to enter into ſecurity for him to a certain amount, who would not undertake to indemnify the pariſh to an indefinite extent: and they may thus be left without any other ſecurity, than the precarious future reſponſibility of the putative father himſelf. The ſtatute, however, certainly meant merely to indemnify the pariſh, and not to create a ſpeculation of loſs or profit to them upon the life or death of the child; and the pariſh officers ſhould have

no

no temptation to be careleſs in the execution of their truſt. And it muſt be admitted that they will not have the ſame intereſt to take care of the child, for whoſe maintenance they have received ſecurity for a ſum certain, as if it were taken only for their indemnity. Upon the whole therefore, weighing the inconveniences on either ſide, it is better to abide by the ſtrict letter of the ſtatute."

CHAPTER IX.

Of Truſtees.

A BREACH of truſt, in ſome inſtances, may be the ground of an action of *aſſumpſit*, though the uſual remedy is by bill in equity.

Thus, in the caſe of *Smith* and others v. *Jameſon* and another, (*a*) where a truſtee having received truſt-money, applied it to his own uſe, in the way of his trade: the court held, that he was liable to an action of *aſſumpſit*, for money had and received, for the money ſo miſapplied.

But truſtees, by ſubmitting matters of truſt to arbitration, do not make themſelves *perſonally* liable, except ſo far as they have effects of the truſt-eſtate.

Thus, in the caſe of *Davies* v. *Ridge* and others, (*b*) which was an action of *aſſumpſit* upon an award, and for money had and received, againſt the defendants, as truſtees of a Mr. *Pigot*, of *Peplow* in *Shropſhire*. The plaintiff had been a judgment creditor for 9,000*l.*, part of which had been paid, and it had been referred to arbitration, to aſcertain how much was really due upon the judgment. The arbitrators had made an award in favour of the plaintiff.

Lord *Eldon*, Ch. J. ſaid: "The plaintiff muſt ſhow the defendants had effects of the truſt-eſtate; ſubmitting to arbitration did not make them *perſonally* liable."

(*a*) 5 *Term Rep.* 601. *See alſo Willes Rep.* 405. *S. P.*
(*b*) 3 *Eſp. Rep.* 101.

It

It was proved that one of the truſtees had admitted, that he had money of the truſt-eſtate in his hands: and upon this evidence it was ſubmitted, that the admiſſion of one of them bound the reſt.

Lord *Eldon* ſaid: "It would, if they were all *perſonally* liable; but not where they are only truſtees."

CHAPTER X.

Of Bankrupts and their Aſſignees.

The Subject of the preſent Chapter will be conſidered under the following Heads:

1. *Of a Bankrupt's Certificate and Diſcharge from Debts, &c.*

2. *Of the Action of Aſſumpſit by a Bankrupt, relating to Property which he holds in Truſt.*

3. *Of Contracts made with an uncertificated Bankrupt.*

4. *Of a Bankrupt's Allowance, &c.*

5. *Of Promiſes to pay a Debt barred by a Bankrupt's Certificate.*

6. *Of the Aſſignment of a Bankrupt's Eſtate to his Aſſignees; and of their Right to receive and diſcharge Debts, and proſecute Actions, &c.*

7. *Of Payments, &c. made to, or by a Bankrupt, when protected.*

8. *In what Caſes an Action of* Aſſumpſit *will lie at the Suit of Aſſignees for Money received of a Bankrupt, either in Contemplation of, or after an Act of Bankruptcy.*

9. *Of*

9. *Of an Action at Law by Aſſignees, for Money or Goods belonging to a Bankrupt abroad, attached at the Inſtance of a Creditor reſiding in* England, *after Notice of the Aſſignment, &c.*

10. *In what Caſes Aſſignees are liable to an Action of* Aſſumpſit *for Rent, and for Money had and received, &c.*

11. *Of the Aſſignee's Liability to an Action of* Aſſumpſit *for a Dividend, and for an Allowance to a Witneſs, &c.*

12. *Of Monies received by Aſſignees, who have been removed, &c.*

13. *Of Promiſes to pay Money in Conſideration that the Aſſignees will forbear to examine the Bankrupt, or will ſtay Proceedings under the Commiſſion, &c.*

1. *Of a Bankrupt's Certificate and Diſcharge from Debts, &c.*

By the ſtatute 5 Geo. II. c. 30. ſ. 7. it is enacted, "That all and every perſon and perſons ſo become, or to become bankrupts, who ſhall in all things conform as in and by this act is directed, ſhall be diſcharged from all debts, by him, her, or them due or owing at the time that he, ſhe, or they did become bankrupt. And in caſe any ſuch bankrupt ſhall afterwards be arreſted, proſecuted, or impleaded for any debt due before ſuch time, as he, ſhe, or they became bankrupt, ſuch bankrupt ſhall be diſcharged upon common bail, and ſhall and may plead in general, that the cauſe of ſuch action or ſuit did accrue before ſuch time as he, ſhe, or they became bankrupts, and may give this act, and the ſpecial matter in evidence; and the certificate of ſuch bankrupt's conforming, and the allowance thereof, according to the directions of this act, ſhall be, and ſhall be allowed to be ſufficient evidence of the trading, bankruptcy, commiſſion, and other proceedings, precedent to the obtaining ſuch certificate, and a verdict ſhall thereupon paſs for the defendant, unleſs the plaintiff, in ſuch action, can prove the ſaid certificate was obtained unfairly and by fraud, or unleſs the plaintiff, in ſuch action, can make appear any concealment by ſuch bankrupt to the value of ten pounds; and if a verdict paſs for the defendant, or the plaintiff ſhould become nonſuited, or judgment be given againſt the plaintiff, the defendant ſhall recover his full coſts."

But by ſect. 9. it is provided and enacted, "That in caſe any commiſſion of bankruptcy ſhall iſſue againſt any perſon or perſons, who ſhall have been diſcharged by virtue of this act, or ſhall have compounded with his, her, or their creditors, or delivered to them, his, her, or their eſtate or effects, and been releaſed by them, or been diſcharged by any act for the relief of inſolvent debtors after the time aforeſaid, that then, and in either of thoſe caſes, the body and bodies only of ſuch perſon and perſons, conforming as aforeſaid, ſhall be free from arreſt and impriſonment, by virtue of this act; but the future eſtate and effects of every ſuch perſon and perſons ſhall remain liable to his, her, or their creditors, as before

fore the making of this act, (the tools of trade, the neceſſary houſhold goods and furniture, and neceſſary wearing apparel of ſuch bankrupt, and his wife and children only excepted,) unleſs the eſtate of ſuch perſon or perſons, againſt whom ſuch commiſſion ſhall be awarded, ſhall produce clear, after all charges, ſufficient to pay every creditor, under the ſaid commiſſion, *fifteen ſhillings in the pound, for their reſpective debts.*"

And by the 10th ſection of the ſame act, it is alſo provided and enacted, "That no diſcovery, upon oath, or ſolenm affirmation, to be made by any bankrupt or bankrupts, of his, her, or their eſtate and effects, purſuant to this act, ſhall intitle ſuch bankrupt or bankrupts to the benefits allowed by this act, unleſs the commiſſioners, authorized by ſuch commiſſion, or the major part of them, ſhall, in writing under their hands and ſeals, certify to the *Lord Chancellor* or *Lord Keeper*, or commiſſioners for the cuſtody of the Great Seal of *Great Britain*, for the time being, that ſuch bankrupt or bankrupts hath or have made a full diſcovery of his, or her eſtate and effects, and in all things conformed himſelf, herſelf, or themſelves, according to the directions of this act; and that there doth not appear to them any reaſon to doubt of the truth of ſuch diſcovery, or that the ſame is not a full diſcovery of all ſuch bankrupt's eſtate and effects; and unleſs four parts in five in number and value of the creditors of ſuch bankrupt or bankrupts, who ſhall be creditors for not leſs than twenty pounds reſpectively, and who ſhall have duly proved their debts under ſuch commiſſion, or ſome other perſon by them reſpectively duly authorized thereunto, ſhall ſign ſuch certificate, and teſtify their conſent to ſuch allowance and certificate, and to the ſaid bankrupt's diſcharge, in purſuance of this act, to be alſo certified by ſuch commiſſioners; but the ſaid commiſſioners ſhall not certify the ſame, till they ſhall have proof by affidavit or affirmation, in writing, of ſuch creditors, or of the perſon by them reſpectively authorized for that purpoſe, ſigning the ſaid certificate, and of the power and authority by which any perſon ſhall be authorized by any creditor to ſign ſuch certificate for any creditor; which affidavit or affirmation, together with ſuch warrant or authority to ſign, ſhall be laid before the *Lord High Chancellor*, *Lord Keeper*, or commiſſioners of the Great Seal, with the ſaid certificate, in order for the allowing and confirming the ſame; and unleſs ſuch bankrupt make oath, or, being of the people called

called Quakers, ſolemnly affirm, in writing, that ſuch certificate and conſent of the creditors thereunto were obtained fairly and without fraud, and unleſs ſuch certificate ſhall, after ſuch oath or affirmation of the bankrupt, be allowed and confirmed by the *Lord Chancellor*, *Lord Keeper*, or commiſſioners for the cuſtody of the Great Seal of *Great Britain*, for the time being, or by ſuch two of the Juſtices of the Court of *King's Bench*, *Common Pleas*, or Barons of the Court of *Exchequer* at *Weſtminſter*, to whom the conſideration of ſuch certificate ſhall be referred by the *Lord Chancellor*, *Lord Keeper*, or commiſſioners of the Great Seal, for the time being; and any of the creditors of ſuch bankrupt are to be allowed to be heard, if they ſhall think fit, before the reſpective perſons aforeſaid, againſt the making ſuch certificate; and againſt the confirmation thereof; nor ſhall any commiſſioner ſign ſuch certificate till after four parts in five in number and value of the ſaid creditors ſhall have ſigned the ſame as aforeſaid."

And by the 12th ſection of the act it is further provided and enacted, "That nothing in this act ſhall be conſtrued to extend, or give or grant any privilege, benefit, or advantage, to any bankrupt whatſoever, againſt whom a commiſſion of bankrupt, under the Great Seal of *Great Britain*, ſince the ſaid fourteenth day of *May*, which was in the year of our Lord one thouſand ſeven hundred and twenty-nine, hath iſſued, or hereafter ſhall iſſue, who hath or ſhall, for or upon marriage of any of his or her children, have given, advanced, or paid above the value of one hundred pounds, unleſs he or ſhe ſhall prove, or by his or her books fairly kept, or otherwiſe, upon his or her oath, or being of the people called Quakers, upon ſolemn affirmation, before the major part of the commiſſioners in ſuch commiſſion named and authorized, that he or ſhe had at the time thereof, over and above the value ſo given, advanced or paid, remaining in goods, wares, debts, ready money, or other eſtate real or perſonal, ſufficient to pay and ſatisfy unto each and every perſon, to whom he or ſhe was anywiſe indebted, their full and intire debts; or who hath or ſhall have loſt in any one day, the ſum or value of five pounds, or in the whole the ſum or value of one hundred pounds, within the ſpace of twelve months next preceding his, her, or their becoming bankrupt, in playing at or with cards, dice, tables, tennis, bowls, billiards, ſhovel-board, or in or by cock fighting, horſe

horſe races, dog matches, or foot races, or other paſtimes, game or games whatever, or in or by bearing a ſhare or party in the ſtakes, wager, or adventure, or in or by betting on the ſides or hands of ſuch as do or ſhall play, act, ride, or run as aforeſaid; or that within one year before he or ſhe became bankrupt, ſhall have loſt the ſum of one hundred pounds, by one or more contracts for the purchaſe, ſale, refuſal, or delivery of any ſtock of any company or corporation whatſoever; or any parts or ſhares of any government or public funds or ſecurities; where every ſuch contract was not to be performed within one week, from the time of the making ſuch contract, or where the ſtock or other thing, ſo bought or ſold, was not actually transferred or delivered in purſuance of ſuch contract."

By the ſtat. 7 Geo. I. c. 31. ſ. 2. it is alſo enacted, "That all and every perſon or perſons, who now are or ſhall become bankrupts, ſhall be diſcharged of and from all and every bill, bond, promiſſory note, or other perſonal ſecurity for money, payable at the end of three, four or ſix months, or any other future days of payment, and ſhall have the benefit of the ſeveral ſtatutes now in force againſt bankrupts, in like manner, to all intents and purpoſes, as if ſuch ſum of money had been due and payable before the time of his becoming a bankrupt."

The ſtat. 10 Ann, c. 15. ſ. 3. enacts, "That by the diſcharge of any bankrupt or bankrupts by force of that act, or any other acts relating to bankrupts, from the debts by him, her or them due and owing, at the time that he, ſhe or they did become bankrupt, ſhall not be conſtrued, nor was meant or intended to releaſe or diſcharge any other perſon or perſons, who was or were partner or partners with the ſaid bankrupt in trade, at the time he, ſhe, or they became a bankrupt, or then ſtood jointly bound, or had made any joint contract together with ſuch bankrupt or bankrupts, for the ſame debt or debts, from which he was diſcharged, as aforeſaid; but that notwithſtanding ſuch diſcharge, ſuch partner and partners, joint obligor and obligors, and joint contractors, with ſuch bankrupt and bankrupts, as aforeſaid, ſhall be and ſtand chargeable with and liable to pay ſuch debt and debts, and to perform ſuch contracts, as if the ſaid bankrupt and bankrupts had had never been diſcharged from the ſame."

A bank-

A bankrupt's certificate is a diſcharge from all *debts*, due or owing by him at the time of his bankruptcy, which were proveable under his commiſſion; and it is a bar againſt all creditors, whether they have ſigned the certificate or not (*a*). A certificate, however, is no bar to a contract which does not relate to the payment of money; but is for the doing or forbearing to do ſome other act.

So, a certificate does not diſcharge a bankrupt from a contingent debt, which is not reduced to a certainty before the act of bankruptcy is committed, becauſe it cannot be proved under the commiſſion: and in queſtions whether a debt is diſcharged or not by a certificate, the point agitated has always been, whether it could be proved or not; the creditor's right to prove, and the bankrupt's right to be diſcharged by the certificate, being reciprocal and co-extenſive (*b*).

Therefore, where A. lent his acceptances to the bankrupt, who gave him a receipt as for ſo much money, the acceptances did not become due till after the bankruptcy. It was held that the certificate did not bar, and that the receipt did not create a debt proveable (*c*).

So, if a perſon lends a trader ſtock in the public funds, to be replaced as ſtock, without naming any particular time at which it is to be inveſted: if he becomes bankrupt before he has been required to replace the ſtock, it is a contingent debt, and cannot be proved (*d*); for it is clear, that where there is only a cauſe of action exiſting, and the debt is to ariſe on a ſtipulation which has not been broken, previous to the time of the bankruptcy, and the debt remains to be inquired into, there the creditor cannot prove his debt under the commiſſion, and the demand will remain undiſcharged by the certificate (*e*).

So, in the caſe of *Parſlow* v. *Dearlove* (*f*), it was determined that money payable half yearly for the education and board of the children of a bankrupt, is not a debt due till the end of the half

(*a*) *See Co. bankrupt laws*, 465, 471, *&c.*; *and as to what debts may or may not be proved under the Commiſſion, vide ſame book, cap.* 6.
(*b*) *Ibid.* 503. (*c*) Snaith *v* Gale, 7 *Term Rep.* 364.
(*d*) *Ibid.* 197. (*e*) *Ib.* 199. 4 *Term Rep.* 571.
(*f*) 4 *Eaſt Rep.* 438.

year,

year, ſo as to be proveable under a commiſſion of bankrupt againſt the parent, who became bankrupt a few days before the end of the half year, though he had juſt before his bankruptcy, taken his ſon home for the holidays, the contract not being thereby put an end to: and conſequently the bankrupt's certificate, under the ſtat. 5 *G.* II. c. 30. is no bar to an action againſt him for the half-year's education, &c. The ſtat. 7 *G.* I. c. 31. ſ. 1. which enables debts payable at a future day to be proved under the commiſſion, is confined to written ſecurities.

So, in the caſe of *Bamford* v. *Burrell* (*g*), it was held, that a debt accrued ſubſequent to an act of bankruptcy, and previous to the iſſuing of the commiſſion, is not barred by the certificate.

So, where a man undertakes to pay a ſum of money for another, his undertaking alone will not create a debt that he can prove under a commiſſion; and if an act of bankruptcy intervenes between the undertaking and the actual payment, it can never be proved, and the creditor can only reſort to the bankrupt perſonally. But if the party engaging to pay the debt of another is taken in execution for that debt, his impriſonment is conſidered as a payment and ſatisfaction of the debt, ſufficient to give him a right of proving under the commiſſion.

Thus, in the caſe of *Chilton* v. *Whiffen* and another (*h*), which was an action of *aſſumpſit*, wherein the plaintiff declared, that the defendants and one *William Hinkley* were co-partners in trade and merchandize; that *Hinkley* drew a bill of exchange upon the plaintiff, dated the 18th day of *March* 1766, for 65*l.* payable to one *Robert Clay*, or his order, fifty-five days after date; and in conſideration that the plaintiff would accept the ſaid bill, the defendants undertook and promiſed to find money to pay the bill, take it up, and to ſave the plaintiff harmleſs and indemnified, by reaſon of his acceptance thereof; that he accepted the bill, which became due the 16th of *May* 1766, and was indorſed by *Robert Clay* to *Heathfield* and *Smith*, who, on the 15th of *September* 1766, ſued out proceſs, and cauſed plaintiff to be arreſted and held to bail for the ſaid 65*l.*; that, on the 24th of *November* 1766, he put in bail to that action; and in *January* 1767, was ſurrendered to the marſhal of the Marſhalſea, was charged in execution for the

(*g*) 1 *Boſ. & Pul.* 1. (*h*) 3 *Wilſ.* 13.

debt of 65*l.* and coſts, and remained in execution. The defendant pleaded his certificate in bar, and that he became bankrupt on the 16th *Auguſt* 1766.

Lord Chief Juſtice *Wilmot* delivered the opinion of the Court as follows: "That no debt was due or owing from the defendants to the plaintiff, until he was charged in execution, and his body being in priſon, upon judgment and execution, for a certain ſum, is the very ſame thing as if the plaintiff had paid the debt and coſts due on account of the bill and note; and then, and not before, the defendants became indebted to the plaintiff; which being after the defendants became bankrupts, the plaintiff could not come in under the commiſſion. No debt could be barred by the certificate, but what was a debt contracted with certainty before the act of bankruptcy. Did the defendants owe to *Chilton* 308*l.* 10*s.* and coſts, before he rendered his body in ſatisfaction thereof? which we take to be the ſame thing as if he had actually paid the debt and coſts thereof. They certainly did not. They had promiſed to pay the money, or furniſh the plaintiff *Chilton*, with money to take up the bill, and to ſave him harmleſs. They broke their promiſe: *Chilton* was terrified and arreſted. Here is an injury to a certain degree, but no debt owing by the defendants to *Chilton* before his body was in execution for the certain ſum. How could the plaintiff, *Chilton*, at the time of the commiſſion of bankruptcy iſſued, have ſworn to a debt before he had advanced a ſhilling to the defendants? He certainly could not, but now his body being in execution, he has thereby paid the debt, and conſequently may ſupport the preſent action."

So, in the caſe of *Young* v. *Hockley*, (*i*) where the bankrupt, on the 25th *June* 1769, drew a bill of exchange on *Young* for 57*l.* 5*s.* 4*d.* payable one month after date, to his own order, which *Young*, on the ſame day, for the accommodation of the bankrupt accepted. On the 12th *July*, a commiſſion of bankrupt was iſſued againſt the defendant. The bill became due the 28th *July*, when *Young* paid it. The bankrupt obtained his certificate on the 5th of *September* 1769, which was allowed on the 23d *October*. The Court were of opinion that the certificate was no bar to the action brought by *Young*, and that the point was now entirely ſettled.

(*i*) 2 *Bl. Rep.* 839. *See alſo* 3 *Wilſ.* 528. *Doug.* 166. *n.* 55. *S. P.*

So,

So, in the caſe of *Taylor* v. *Mills* and *Magnall*, (*k*) which was an action of *aſſumpſit* for money paid. The facts were theſe: the defendants were partners with one *Bailey*; and, in order to raiſe money, they had entered into certain bonds. In the year 1765, *Bailey* withdrew from the partnerſhip, and wiſhing to be diſcharged from theſe bonds, application was made to *Taylor* to become ſurety inſtead of *Bailey*, to which he conſented: upon which the former bonds were cancelled. The bonds became due, and afterwards *Mills* and *Magnall* became bankrupts. When the obligees had got as much as they could from the partnerſhip eſtate, and which amounted to no more than 6*s.* in the pound, they came upon the plaintiff for the reſidue. He accordingly paid it, and then brought his action for money paid, laid out, and expended.

The Court held that the action would lie. Lord *Mansfield* ſaid, "this caſe is not harder than every other caſe of a debt ariſing after bankruptcy, upon a pre-exiſting ground. At the time of the bankruptcy, the defendants were not indebted to *Taylor*; he clearly, therefore, could not come in as a creditor under the commiſſion. He was not damnified at that time; and till damnified, (which he could not be till he had been called upon and had paid) he could not bring an action. He did not pay till after the commiſſion iſſued; conſequently his whole damage and cauſe of action aroſe after the bankruptcy, and therefore could not be diſcharged by the certificate. With reſpect to the money received by the original creditors, under the commiſſion, it is a diſcharge of ſo much of the debt, and the ſurety is only liable for the remainder; conſequently he can recover no more againſt the defendants. But as to that, he is a new creditor, and therefore is not barred by the certificate. It is an extremely clear caſe, and not different from any where the cauſe of the action, though it ariſes after the bankruptcy, is founded on a pre-exiſting ground.

So, in the caſe of *Paul* v. *Jones* (*l*), it was determined that a ſurety who does not pay the debt of the principal till after his bankruptcy, though called upon and liable to pay it before, may maintain an action of *aſſumpſit* for money paid, laid out, and expended, notwithſtanding the bankrupt's certificate.

(*k*) *Cowp.* 525. (*l*) 1 *Term Rep.* 599.

But

But where a surety will not rely on the promise which the law will raise, but takes a bond as a security, there he has chosen his own remedy, and he cannot resort to an action on assumpsit for money paid, but must prove his debt under the commission, the bond being the debt (*m*).

The bankrupt laws being now adopted in *Ireland*, if a trader there becomes a bankrupt, and obtains his certificate, it will operate as a discharge in an action brought here upon a debt arising in *Ireland*.

Thus, in the case of *Ballantine* v. *Golding*, (*n*) which came before the Court of *King's Bench*, on a motion to enter an *exoneretur* on the bail piece, it appeared that the defendant had been a bankrupt, and obtained a certificate under the Great Seal of *Ireland*.

The original demand arose upon a bill of exchange drawn in *Ireland*, and payable by the defendant, who resided there.

Lord *Mansfield* said, "It is a general principle, that, where there is a discharge by the law of one country, it will be a discharge in another; that he remembered a case in *Chancery* of a *cessio bonorum* in *Holland*, which is held a discharge in that country, and it had the same effect here. The rule was accordingly made absolute.

But a certificate in a foreign country will not bar a debt contracted in this country.

Thus, in the case of *Smith* and another v. *Buchanan* and another (*o*), which was an action of *assumpsit* for goods sold and delivered. The defendant pleaded first, *non-assumpsit*; secondly, for a further plea in discharge of the persons, estate, and effects of the defendants, except any property, if any there be, after the date of a certain deed, dated 23d of *September* 1799, aftermentioned, acquired or to be acquired by the defendants, by descent, devise, bequest, or in course of distribution; they say that by a certain law of the state of *Maryland*, made on the 10th of *April* 1787, intituled, "An Act respecting "insolvent debtors;" it was enacted, that any debtor for any sum above 300*l.* might apply by petition to the Chancellor of the said

(*m*) 2 *Term Rep.* 100. 640. 7 *Term Rep.* 97.
(*n*) *B.R. Mich.* 24 *Geo.* III. *Co. bankrupt laws*, 499. *See also* Burrows v. Jemino, 2 *Stra.* 733. *S. P.*
(*o*) 1 *East Rep.* 6. *Vide Co. bankrupt laws*, 500.

state,

ſtate, and offer to deliver up all his property to his creditors, a ſchedule whereof, with a liſt of creditors, ſhould be exhibited therewith; and thereupon the Chancellor might direct perſonal notice of ſuch application to be given to the creditors, or as many as could be ſerved therewith, or he might direct the notice to be publiſhed in the newſpapers; and, on the appearance of the creditors, or their neglect to appear on due notice, the Chancellor might adminiſter an oath to the debtor, binding himſelf to deliver up and transfer to his creditors all his property, &c in ſuch manner as the Chancellor ſhould direct; and that the Chancellor ſhould thereupon appoint a truſtee on behalf of the creditors, and ſhould direct ſuch debtor to execute a deed to ſuch truſtee of all his property, debts, rights, and claims, in truſt for the creditors;" and thereupon, and upon the execution of the ſaid deed, and after the delivery of the property, books, bonds, and other evidences of debts, to ſuch truſtee, and his certificate of ſuch delivery, the Chancellor might order that ſuch debtor ſhould for ever thereafter be acquitted and diſcharged from all debts by him owing or contracted, at any time before the date of ſuch deed;" and in virtue of ſuch order, ſuch debtor ſhould be for ever ſo diſcharged: provided that any property thereafter acquired by ſuch debtor by deſcent, deviſe, bequeſt, or in courſe of diſtribution, ſhould be liable to the payment of his debts. The plea further ſtated, that, after the making of that law, the defendants were joint debtors for more than 300*l.*; that they petitioned the Chancellor, and offered to deliver up all their property to the uſe of their creditors, with the ſchedule and liſt of creditors thereunto annexed; that thereupon the Chancellor gave the due notice to the creditors, and adminiſtered the oath to the defendants, and appointed one *S. Neale* truſtee on behalf of the creditors; and directed the defendants to execute a deed to the ſaid *S. N.* for all their property, debts, rights, and claims, &c. in truſt for their creditors; that thereupon the defendants did accordingly, on the 23d of *September*, 1799, execute ſuch deed of that date, and did then deliver up to the ſaid *S. N.* as ſuch truſtee, &c all their property, books, &c., who thereupon certified ſuch delivery to the ſaid Chancellor; and thereupon the Chancellor, according to the ſaid act, ordered, that the defendants ſhould forever thereafter be acquitted and diſcharged from all debts by them owing or contracted, before the date of the ſaid deed; except that any property afterwards acquired by them, by deſcent, &c. ſhould be liable to the payment

of their debts. The defendants then averred that they, at the time when the ſeveral cauſes of action in the declaration mentioned accrued, and until and at the time of the ſaid order of diſcharge, were inhabitants, and reſident in the ſaid ſtate of *Maryland*, and that the ſaid ſeveral cauſes of action accrued, and were owing before the date of the ſaid deed of truſt executed by the defendants to *S. M.* Wherefore they prayed judgment, and that their perſons, eſtates, and effects, ſave and except any property, if any, acquired after the date of the ſaid deed, by the defendants, by deſcent, &c. might be diſcharged, &c. A third plea contained the the ſame facts, together with an averment that the defendants had not, ſince the date of the truſt deed, acquired any property by deſcent, &c. and concluded in bar of the action generally. The replication to theſe two pleas ſtated, that the cauſes of action in the declaration mentioned ſeverally accrued to the plaintiffs within this kingdom of *England:* to which there was a general demurrer and a joinder therein.

Lord *Kenyon*, Ch. J. ſaid, "It is impoſſible to ſay that a contract made in one country, is to be governed by the laws of another. It might as well be contended, that if the ſtate of *Maryland* had enacted that no debts due from its own ſubjects to the ſubjects of *England* ſhould be paid, the plaintiffs would have been bound by it. This is the caſe of a contract lawfully made by a ſubject in this country, which he reſorts to a court of juſtice to enforce; and the only anſwer given is, that a law has been made in a foreign country to diſcharge theſe defendants from their debts, on condition of their having relinquiſhed all their property to their creditors. But how is that an anſwer to a ſubject of this country, ſuing on a lawful contract made here? How can it be pretended that he is bound by a condition to which he has given no aſſent, either expreſſed or implied? It is true, that we ſo far give effect to foreign laws of bankruptcy, as that aſſignees of bankrupts, deriving titles under foreign ordinances, are permitted to ſue here for debts due to the bankrupt's eſtates: but that is becauſe the right to perſonal property muſt be governed by the laws of that country, where the owner is domiciled. That was recogniſed in the caſe of *Hunter* v. *Potts* (*q*). The court there conſidered the aſſignment of the bankrupt's effects in another country,

(*q*) 4 *Term Rep.* 182 *and* 192.

although

although in fact made *in invitum*, as equivalent here to a voluntary conveyance by him. The caſe of *Ballantine* v. *Golding* (*r*), is very diſtinguiſhable from the preſent; for there the debt was contracted in *Ireland*, where the commiſſion iſſued. But in the ſame page of the book from whence that was quoted,* is to be found an opinion of Lord *Talbot's*, directly contrary to the concluſion we are deſired to draw in this caſe; for there he held that, though the commiſſion of bankrupt iſſued here attached on the bankrupt's effects in the plantations, yet his certificate would not protect him from being ſued there for a debt ariſing therein. The ſame rule then muſt prevail here."

Lawrence, J. ſaid, "If the defendants had made a voluntary aſſignment of all their property to the uſe of their creditors, it is not pretended that that would have been a bar to the ſuit of the plaintiffs: and yet the title of the aſſignee would have been as valid here as under the foreign commiſſion; which ſhows that the validity of the title, under ſuch an aſſignment, cannot make any difference in the preſent argument. Then it reſts ſolely on the queſtion, whether the law of *Maryland* can take away the right of a ſubject of this country to ſue upon a contract made here, and which is binding by our laws? This cannot be pretended, and therefore the plaintiffs are entitled to judgment."

The other Judges concurred, and judgment was given for the plaintiffs.

2. *Of the Action of Aſſumpſit by a Bankrupt, relating to Property which he holds in Truſt.*

Property in which a bankrupt has only a truſt eſtate does not paſs to his aſſignees under the aſſignment. Therefore the *ceſtuy que* truſt cannot bring any action reſpecting ſuch property in their names, but ought to bring it in the name of the bankrupt.

Thus, in the caſe of *Carpenter* and others v. *Marnell*, (*s*) which was an action of *aſſumpſit* on a note in theſe words: "I promiſe to pay to Mr. *Joſeph Fowler*, or order, the ſum of 150*l*, being the remainder of the conſideration for the aſſignment of his intereſt

(*r*) *Ante* 416. * *Co. Bkpt. Laws*, 500. (*s*) 3 *Bos. & Pull.* 40.

in the *Layton* buſineſs with me, as ſoon as I ſhall receive, or may receive the money due, upon the completion of the ſaid buſineſs, from *T. B.* eſquire, his executors, adminiſtrators, or aſſigns, or immediately upon my receiving letters of adminiſtration of the eſtate and effects of *Lieutenant General Joſeph Walton, otherwiſe Brome*, deceaſed, which ever event ſhall firſt take place;" ſigned, "*Richard Marnell.*" This note was indorſed by *Fowler* to one *James Bagſter*, for a valuable conſideration, after which *Fowler* became bankrupt, and the plaintiffs were choſen his aſſignees; in which capacity they now ſued for the benefit of *Bagſter*.

Lord *Alvanley*, Ch. J. ſaid, "We are all of opinion that this action ought to have been brought by *Fowler*. He was the perſon to whom the promiſe to pay was made; he by his indorſement directed the contents of the note to be paid to *Bagſter*; and though this indorſement had no legal effect, yet it paſſed the beneficial intereſt in the note to *Bagſter*; and *Fowler* by the indorſement became a mere truſtee for him. The aſſignees never were in a ſituation to derive any benefit from this piece of paper. If, indeed, they had poſſeſſed the moſt remote poſſibility of intereſt, or if they could ſtate any thing from which a benefit to the creditors would reſult, I ſhould hold that the action might be maintained; but at the time when they brought this action it was impoſſible for them not to know that they had no right to the the note. They bring the action in the character of truſtees; but they are not truſtees for *Bagſter*; they are only truſtees for *Fowler*'s creditors, and therefore cannot ſuſtain this action.

So, in the caſe of *Winch* v. *Keeley*, (*t*) which was an action of *aſſumpſit* for work and labour, &c. The defendant pleaded bankruptcy in the plaintiff. The plaintiff replied, that before his bankruptcy he was indebted to one *Joſeph Searle* in 73*l.* 12*s.* 9*d.*, and being ſo indebted he, on the 20th *October*, 1785, by his certain deed-poll, did bargain, ſell, aſſign, and transfer to the ſaid *Joſeph Searle* the ſaid ſum of 73*l.* 12*s.* 9*d.* parcel of the money in the ſaid declaration mentioned; to hold the ſame to the ſaid *Joſeph Searle* from thenceforth to his own proper uſe, under a certain proviſo, therein and hereinafter mentioned; and did thereby conſtitute and appoint the ſaid *Joſeph Searle* his true and lawful attorney irrevo-

(*t*) 1 *Term Rep.* 619.

cably,

cably, and did give and grant unto him, his executors and adminiſtrators, full power and authority in his name, to the only proper uſe and behoof of the ſaid *Joſeph*, to aſk, demand, and ſue for, the aforeſaid ſum of 73*l.* 12*s.* 9*d.*, provided always, that if he, the ſaid plaintiff, his executors, or adminiſtrators, ſhould well and truly pay, or cauſe to be paid, unto the ſaid *Joſeph*, the ſaid ſum of 73*l.* 12*s.* 9*d.*, ſo due and owing to him as aforeſaid, within two calendar months after the date of theſe preſents, then the ſaid deed-poll, and every article and clauſe therein contained, ſhould be void; as by the ſaid deed-poll, relation being thereunto had, would more fully appear. And the ſaid plaintiff further ſaith, that he did not, at any time within the ſpace of two calendar months after the date of the ſaid deed, pay to the ſaid *Joſeph* the ſaid ſum of 73*l.* 12*s.* 9*d.* ſo due and owing to him as aforeſaid, but that the ſame hath from thence hitherto remained due and unpaid from the ſaid plaintiff, to the ſaid *Joſeph*; and that the original writ, in this ſuit, was ſued out in the name of him, the ſaid plaintiff, for and on behalf of the ſaid *Joſeph Searle*, and for the purpoſe of enabling the ſaid *Joſeph Searle* to receive the ſaid ſum of 73*l.* 12*s.* 9*d.* parcel of the ſaid ſums in the ſaid declaration mentioned, according to the form and effect of the ſaid deed poll, and not for the benefit, uſe, or behoof, of the ſaid plaintiff. To this replication there was a general demurrer and joinder.

The court determined that the bankrupt might ſue in his own name for the benefit of the aſſignee of the debt in queſtion, and gave judgment for the plaintiff accordingly.

3. *Of Contracts made with an Uncertificated Bankrupt.*

An uncertificated bankrupt may maintain an action in his own name, and for his own benefit, for work and labour, and materials found and provided.

Thus, in the caſe of *Silk* v. *Oſborne*, (*v*) which was an action of *aſſumpſit* for work and labour and materials found and provided. The plaintiff proved the work done and the materials furniſhed by him; but in the courſe of the evidence it appeared, that the plain-

(*v*) 1 *Eſp. Rep.* 140

tiff, at the time of the work and labour, and of the trial, was an uncertificated bankrupt. It was therefore contended, that he could not maintain the action, as all his effects belonged to his aſſignees. In anſwer to this objection the counſel for the plaintiff relied on the caſe of *Chippendale* v. *Tomlinſon*, (*) as deciſive in the preſent inſtance; it being there expreſsly decided, that an uncertificated bankrupt could maintain an action for work and labour.

It was anſwered, for the defendant, that that caſe only went the length of deciding, that an uncertificated bankrupt could ſue for, and recover any ſum due to him for his *perſonal labour*; but that the preſent caſe was not confined to perſonal labour only, but embraced a more extenſive cauſe of action, namely, for materials found; that theſe were a ſpecies of property, which paſſed under his aſſignment, and in which he therefore had no property whatever: ſo that even admitting that the action was maintainable by the bankrupt for work and labour, that for materials found, the action could not be ſupported.

Lord *Kenyon*, Ch. J., before whom the cauſe was tried, ſaid, "That the caſe cited was certainly good law, and in principle ſtrongly applicable to the preſent: that the aſſignees could not hire out the bankrupt, to make a profit of his labour for their benefit, but that for ſuch demands, he ſhould maintain an action in his own name; but his lordſhip added, that he was further of opinion, that where the materials furniſhed were neceſſary to the bankrupt's labour, that in ſuch caſe the work and materials furniſhed became blended together, and formed one joint cauſe of action, upon which the bankrupt might ſue, and was entitled to recover: that however the queſtion might be between the bankrupt and his aſſignees, as they might certainly, take whatever perſonal property belonged to him, without any new aſſignment, that it did not lie in the mouths of third perſons to ſet up ſuch a defence."

So, in the caſe of *Evans* v. *Brown*, (*w*) it was held, that an uncertificated bankrupt might alſo ſue for money lent after his bankruptcy.

* *Co. Dikt. Laws*, 231. (*w*) 1 *Eſp. Rep.* 170. *See alſo* Laroche v. Wakeman, *Peake's Caſ. N. P.* 140. Webb v. Ward, 7 *Term Rep.* 296. Webb v. Fox, *ib.* 391. *S. P.*

Lord

Lord *Kenyon*, Ch. J. in this case said, "The loan was subsequent to the bankruptcy, and for any thing that appeared, the money might have been earned by the bankrupt after his bankruptcy: that if the law allowed him to maintain an action to recover what was due to him for labour, that he was equally intitled to maintain one for the money so earned by his manual labour, which he might have lent to a third person, and which might be, perhaps, the present case; and though when recovered, it would belong to the assignees, that in this case, and between the parties so circumstanced, it could not be set up in bar to this demand."

But, in the case of *Kitchen* v. *Bartsch*,(*x*) the court determined, that it is a good plea to an action on a promissory note, and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay them the money claimed by the plaintiff: and the plaintiff cannot reply that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit, and that the commissioners had made no new assignment of the notes and money to the assignees: *for all after acquired personal property passes under the general assignment.*

4. *Of a Bankrupt's Allowance, &c.*

A bankrupt may maintain an action of *assumpsit* against his assignees for his allowance under the stat. 5 Geo. II. c. 30. s. 7. But such an action will not lie if the certificate be not allowed before payment of the dividends; the bankrupt's only remedy, in such case, being by petition to the Lord Chancellor.

Thus in the case of *Groome* v. *Potts* and others,(*y*) which was an action of *assumpsit* by the plaintiff a certificated bankrupt against the defendants, who were the executors of *Neal*, the assignee under the plaintiff's commission, to recover 25*l.* 6*s.* 7*d.*, for *money had and received to the plaintiff's use*, for his allowance under the stat. 5 Geo. II. c. 30. s. 7., his estate having paid 10*s.* in the pound to his creditors. The commission issued in *June*, 1738, and *Neal*

(*x*) 7 *Esp. Rep.* 53. (*y*) 6 *Term Rep.* 548. 1 *Esp. Rep.* 356 *S. C.*

was choſen an aſſignee, together with another perſon who did not act. In *March*, 1791, the commiſſioners declared a dividend of 12*s.* in the pound, making the uſual order on *Neal*, the aſſignee, to pay that dividend to each of the creditors. In *July*, 1791, a final dividend of 7¾*d.* in the pound was declared, and the ſame order was made by the commiſſioners on the aſſignee. *Neal* accordingly paid the creditors under theſe orders, which exhauſted all the effects. In *July*, 1795, the plaintiff obtained his certificate. Theſe facts having been proved at the trial before Lord *Kenyon*, Ch. J. it was objected that the plaintiff could not recover; for that at the times when the dividends were declared the bankrupt had not obtained his certificate, and was not therefore entitled to any allowance under the ſtatute; and of this opinion was his lordſhip, and directed the plaintiff to be nonſuited. And upon a motion for ſetting aſide the nonſuit, the Court of *King's Bench* held, that the action could not be ſupported.

Lord *Kenyon*, Ch. J. ſaid: "If this defendant were anſwerable in this action, the aſſignees of a bankrupt would be in a very unfortunate ſituation. They are mere truſtees, and act wholly under the direction of the commiſſioners. When a dividend is declared, a right of action againſt the aſſignees accrues to every creditor for his proportion. In this caſe two dividends were declared at a time when the plaintiff had not obtained his certificate, and when it was uncertain whether ſuch certificate ever would be granted; the aſſignee paid the creditors under theſe orders of the commiſſioners; and the bankrupt, having four years afterwards obtained his certificate, now calls on the repreſentatives of the aſſignees for his allowance under the ſtatute: but it would be monſtrous to ſubject them to this demand. A bankrupt muſt put himſelf in a ſituation to demand this allowance, by obtaining his certificate, before payment of the dividends by the aſſignees."

5. *Of Promiſes to pay a Debt barred by a Bankrupt's Certificate.*

Though a bankrupt is diſcharged by his certificate from all debts due at the time of the act of bankruptcy, yet he may voluntarily make himſelf liable on a new promiſe: for all the debts of a bank-

a bankrupt are due in conſcience, notwithſtanding he has obtained his certificate. (z)

Thus, in the caſe of *Trueman* v. *Fenton*, (*a*) which was an action on a promiſſory note bearing date the 11th *February*, 1775, payable to one *Joſeph Trueman*, (the plaintiff's brother,) three months after date for 67*l.*, and indorſed by him to the plaintiff. The declaration alſo contained other counts for goods ſold and delivered, money had and received, and an account ſtated. The defendant pleaded his bankruptcy. And, upon the trial, a ſpecial caſe was reſerved for the opinion of the court, ſtating the anſwer of the plaintiff, in this action, to a bill filed againſt him in the *Exchequer* by the preſent defendant for a diſcovery of the conſideration of the note, the ſubſtance of which was as follows: "That on the 15th of *December*, 1774, the defendant *Fenton* purchaſed a quantity of linen of the plaintiff *Trueman*: and it being uſual to abate 5*l. per cent.* to perſons of the defendant's trade, the price after ſuch abatement made, amounted to 126*l.* 18*s.* That at the time of the ſale it was agreed, that one half of the purchaſe money ſhould be paid at the end of ſix weeks, and the other half at the end of two months: And in conſideration thereof, the plaintiff, *Trueman*, drew two notes of the defendant for 63*l.* 9*s.*, each, payable to his own order, at ſix weeks and two months reſpectively. That the defendant accepted the notes, and thereupon the plaintiff gave him a diſcharge for the ſum. He then denied that he had proved or claimed any debt or ſum of money under the commiſſion: but ſet forth, that he acquainted the defendant he was ſurpriſed at his ungenerous behaviour in purchaſing ſo large a quantity of linen of him at the eve of his bankruptcy, and informed him he had paid away the above two notes: upon which the defendant preſſed him to take up the notes, and propoſed to give him a ſecurity for part of the debt. That afterwards on the 11th of *February*, 1775, the defendant called upon the plaintiff, and voluntarily propoſed to ſecure to him the payment of 67*l.* in ſatisfaction of his debt, if he would take up the two notes, and cancel or deliver them up to the defendant. That the plaintiff agreed

(z) Vide 2 *Term Rep.* 765. (*a*) *Cowp.* 544. *See alſo* Alſop *and another* v. Brown, *Doug.* 191. *But a bankrupt cannot be held to ſpecial bail on ſuch a promiſe*, Baily v. Dillon, 2 *Bur.* 736.

to

to accept this propoſal with the approbation of his attorney, and deſired the note to be made payable to his brother *Joſeph Trueman* or order, three months after date. That he took up the two acceptances, and delivered them to the defendant to be cancelled, and accepted the above note for 67*l.* in ſatisfaction and diſcharge thereof. That a commiſſion of bankruptcy iſſued againſt the defendant on the 19th of *January*, 1775, and that the bankrupt obtained his certificate, on the 17th of *April* following."

The Court of *King's Bench* decided, that the plaintiff was entitled to recover. And Lord *Mansfield*, Ch. J. ſaid: "The general queſtion is, whether a bankrupt *after* a commiſſion of bankruptcy ſued out, may not in conſideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commiſſion, make ſuch creditor a ſatisfaction in part, or for the whole of his debt, by a new undertaking and agreement? A bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his reviving an old debt by a new promiſe, it muſt be founded on the ground of its being *nudum pactum*. As to that, all the debts of a bankrupt are due in conſcience, notwithſtanding he has obtained his certificate; and there is no honeſt man who does not diſcharge them, if he afterwards has it in his power to do ſo. Though all legal remedy may be gone, the debts are clearly not extinguiſhed in conſcience. How far have the courts of Equity gone upon theſe principles? where a man deviſes his eſtate for payment of his debts, a court of equity ſays, (and a court of law in a caſe properly before them would ſay the ſame,) all debts, barred by the ſtatute of limitations, ſhall come in and ſhare the benefit of the deviſe; becauſe they are due in conſcience: therefore, though barred by law, they ſhall be held to be revived, and charged by the bequeſt. What was ſaid in the argument relative to the reviving a promiſe at law, ſo as to take it out of the ſtatute of limitations is very true, the ſligheſt acknowledgement has been held ſufficient; as ſaying: "prove your debt and I will pay you; I "am ready to account, but nothing is due to you:" and much ſlighter acknowledgements than theſe will take a debt out of the ſtatute. So in the caſe of a man who, after he comes of age, promiſes to pay for goods or other things, which, during his minority, one cannot ſay he has contracted for, becauſe the law diſables him from making any ſuch contract; but which he has

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been fairly and honeſtly ſupplied with, and which were not merely to feed his extravagance, but reaſonable for him (under his circumſtances) to have; ſuch promiſe ſhall be binding upon him, and make his former undertaking good. Let us ſee then what the tranſaction is in the preſent caſe. The bankrupt appears to me to have defrauded the plaintiff by drawing him in on the eve of a bankruptcy, to ſell him ſuch a quantity of goods on credit. It was groſsly diſhoneſt in him to contract ſuch a debt, at a time when he muſt have known of his own inſolvency, and which it is clear the plaintiff had not the ſmalleſt ſuſpicion of, or he would not have given credit, and a day of payment *in futuro*. On the other hand, what is the conduct of the plaintiff? He relinquiſhes all hope or chance of benefit from a dividend under the commiſſion, by forbearing to prove his debt, gives up the ſecurities he had received from the bankrupt, and accepts of a note, amounting to little more than half the real debt, in full ſatisfaction of his whole demand. Is that againſt conſcience? is it not on the contrary a fair conſideration for the note in queſtion? He might foreſee proſpects from the way of life the bankrupt was in, which might enable him to recover this part of his debt, and he takes his chance; for till then he could get nothing by the mere impriſonment of his perſon. He uſes no threats, no menace, no oppreſſion, no undue influence, but the propoſal firſt moves from, and is the bankrupt's own voluntary requeſt. The ſingle queſtion then is, whether it is poſſible for the bankrupt in part, or for the whole, to revive the whole debt? As to that Mr. Juſtice *Aſton* has ſuggeſted to me the authority of *Baily* v. *Dillon*, (*b*) where the court would not hold to ſpecial bail, but thought reviving the old debt was a good conſideration."

Where a bankrupt promiſes to pay a debt due before his bankruptcy, the plaintiff may declare generally on the original conſideration.

Thus, in the caſe of *Williams* v. *Dyde* and others, (*c*) which was an action of *aſſumpſit* for goods ſold and delivered, the defendant pleaded his diſcharge under a commiſſion of bankruptcy.

The plaintiff's counſel ſtated, that the defendant had promiſed to pay the debt after he was diſcharged by his certificate. Upon

(*b*) *Ante*, 425. *n. a.* (*c*) *Peake's Caſ. N. P.* 68.

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which the counſel for the defendant, objected that this promiſe could not be given in evidence under the count for goods ſold and delivered. To avail himſelf of this promiſe, the plaintiff ſhould have declared ſpecially, that the defendant being indebted, and having been diſcharged under the commiſſion, promiſed to pay the debt from which he had been ſo diſcharged.

But Lord *Kenyon*, Ch. J. ſaid: "I think this declaration is ſufficient as it ſtands. In caſes where the ſtatute of limitations has been pleaded, the replication that he did promiſe within ſix years has always been held ſufficient; for the new promiſe revives the old debt."

Upon a promiſe by a bankrupt to pay a debt, due prior to his bankruptcy, *when he is able*, the plaintiff in an action on ſuch promiſe muſt prove generally the ability of the bankrupt to pay at the time of the commencement of the action.

Thus, in the caſe of *Besford* v. *Saunders*, (*d*) which was an action of *aſſumpſit* for money paid, lent, had and received, &c. To which the defendant pleaded his bankruptcy. At the trial the plaintiff proved two ſeveral applications to the defendant, who admitted the debt after he had obtained his certificate, and ſaid, "the plaintiff ſhould be no loſer, but that he would pay when he "was able."

It was contended, that this was not an abſolute promiſe, but that the plaintiff ought to ſhow the defendant's ability to pay at the time of the action brought. Lord *Loughborough*, Ch. J., before whom the cauſe was tried, over-ruled this objection, and held, that the promiſe was abſolute, and the benefit of the certificate waived, as to this debt. In conſequence of which a verdict was found for the plaintiff.

But upon a motion for a new trial *Gould*, J. and *Heath*, J. were of opinion, that it was a conditional promiſe, and that the plaintiff ought to have ſhown that the defendant was able to pay.

Lord *Loughborough*, however, retained his former opinion, that the promiſe was not conditional, and that an inquiry into

(*d*) 2 *H. Bl.* 116.

the circumstances of the defendant, could not be a point in considering whether there were a debt or not.*

Where a bankrupt promises to pay a debt due prior to his bankruptcy, in consideration of the creditor's not proving his debt under the commission, if the creditor, to whom such promise is made, opposes the bankrupt in obtaining his certificate, such opposition is a waiver of the promise to pay, &c.

Thus, in the case of *Colls* v. *Lovell*, (*e*) which was an action in *assumpsit*, in which the plaintiff declared, "that the defendant having become a bankrupt and being then indebted to the plaintiff, in consideration that the plaintiff would not prove his debt under the commission, he undertook to pay him eighteen shillings in the pound, on his debt, and to bring forward another person to secure to him the payment of that sum;" it then averred, that the defendant had not paid, nor brought forward any person to secure to him that sum, by reason whereof the defendant became liable, &c.

Upon the trial, the plaintiff proved, by a witness, a treaty for an agreement in substance as stated in the declaration, but the witness, in his cross examination, admitted that the plaintiff had petitioned the Great Seal against the allowance of the defendant's certificate.

The counsel for the defendant then contended, that this was a waiver of the agreement, and deprived the plaintiff of all claim to any benefit to be derived under it.

Lord *Kenyon*, Ch. J. held that it did so, his lordship observed, "That the agreement upon which the present action was founded, must be supposed to have been entered into with a view to discharge the defendant from his debts, by the plaintiff's co-operating in the discharge, which the defendant would obtain by means of his certificate. That the plaintiff, by opposing the defendant's certificate, had been guilty of *mala fides*, as defeating the object of the agreement by an act totally inconsistent with it. That he should therefore be held, to have abandoned it, and not now be allowed to resort to it, or to maintain an action which had the agreement for its foundation.

* *Sed vide* Cole v. Saxby, *Ante tit.* Infants, 164. *contra.* (*e*) 1 *Esp. Rep.* 282.

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An agreement made by a bankrupt, or any one on his behalf, to pay a ſum of money to his creditor if he will ſign his certificate is void. (*f*)

So, (*g*) a ſecurity given to a creditor of a bankrupt, in order to induce him to withdraw a petition which he had preferred to the Chancellor againſt the allowance of the certificate, is alſo void by the ſtat. 5 Geo. II. c. 30. ſ. 11.

6. *Of the Aſſignment of a Bankrupt's Eſtate to his Aſſignees; and of their Right to receive and diſcharge Debts and Proſecute Actions, &c.*

By the ſtats. 13 Eliz. c. 7. ſ. 11. and 1 Jac. 1. c. 15. the commiſſioners may aſſign all money, goods, chattels, merchandizes, wares, and debts due to the bankrupt from any perſon, and in what manner ſoever, and the aſſignment veſts the property, as well preſent as future in the aſſignee, and the bankrupt ſhall not afterwards recover, releaſe, or diſcharge the ſame, nor ſhall it be attached as a debt of the bankrupt's. (*h*)

But until aſſignment, the property remains in the bankrupt.

Thus, in the caſe of *Cary* v. *Criſp*, (*i*) which was an action of *indebitatus aſſumpſit*; the defendant pleaded, that the plaintiff became bankrupt, and that a commiſſion was taken out, and therefore all his goods, &c. belonged to the commiſſioners, &c. The plaintiff demurred, and had judgment; for till an aſſignment, the property of the goods is not transferred out of the bankrupt.

One of ſeveral aſſignees of a bankrupt may receive the monies belonging to the eſtate, and give a valid diſcharge for the ſame.

Thus, in the caſe of *Smith* and others v. *Jameſon* and others, (*k*) which was an action of *aſſumpſit* for money had and received. It

(*f*) *Vide Stat.* 5 Geo. II. *c.* 30. *ſ.* 11. Jones *v.* Berkley, *Doug.* 695. *n.* 3. Smith *v.* Bromley, *Ibid.* 696. *n.* 3.

(*g*) Sumner *v.* Brady, *and others*, 1 *H. Bl.* 647.

(*h*) Vide *Co. Bkpt. Laws, cap.* 8. *ſ.* 10.

(*i*) 1 *Salk.* 108. *See alſo Str.* 981. *S. P.* (*k*) 1 *Eſp. Rep.* 114.

appeared

appeared that the defendants had been partners in trade: while they were in partnerſhip one of them being aſſignee to a bankrupt eſtate had uſed part of the money belonging to that eſtate in the partnerſhip trade, without the knowledge or acquieſcence of the other aſſignees, who were the plaintiffs in the preſent action, but with the knowledge of his partner that the money was part of the bankrupt eſtate. In *December*, 1792, the partnerſhip was diſſolved, and the partner, who was the aſſignee, continued in the buſineſs, and received from the other money and effects ſufficient to diſcharge all debts due by the partnerſhip, including the money of the bankrupt eſtate, of which they had had the uſe.

It then became a queſtion, whether this was a repayment to the partner who was aſſignee, and ſo ſhould diſcharge the other.

Lord *Kenyon*, Ch. J., before whom the cauſe was tried, was of opinion, that one aſſignee of a bankrupt eſtate might receive the monies belonging to the eſtate, and give a legal and valid diſcharge for it.

By the ſtat. 5 Geo. II. c. 30. ſ. 38. the aſſignees are prohibited from commencing any ſuit in *equity*, without the conſent of the major part in value of the creditors of the bankrupt, who ſhall be preſent at a meeting called for that purpoſe. (*l*)

So, they cannot ſubmit matters to arbitration without the like conſent. (*m*)

But they may bring *actions at law* without firſt calling a meeting of the creditors. (*n*)

If the ſame perſons are aſſignees of two partners under a ſeparate commiſſion againſt each, they cannot, in one action, ſue for a debt due to the two, and alſo for debts due to each individually. (*o*)

Where the aſſignees bring an action upon a contract made by the bankrupt *before his bankruptcy*, they muſt ſue as aſſignees, and ſtate themſelves as ſuch in the declaration; but if they ſue upon a contract made after the bankruptcy, they need not ſue in their repreſentative character as aſſignees, but in their own right.

(*l*) *See alſo Co. Bkpt. Laws, ch.* 14. *ſ.* 1. (*m*) *Ibid.* 261.
(*n*) *Ibid. ch.* 14. *ſ.* 2. (*o*) Vide 3 *Term Rep.* 433. 779.

Thus,

Thus, in the caſe of *Evans* and others v. *Mann*, (*p*) where it appeared that the bankrupt ſome years after his bankruptcy, and before he had obtained a certificate, continued to carry on his trade as a lighterman, in buying and ſelling lighters; and, amongſt others, ſold a lighter to the defendant, who paid him 30*l.* part of the purchaſe money, at the time of the ſale. Afterwards the plaintiffs, hearing of the ſale, applied to the defendant, and inſiſted upon having the lighter delivered up to them, or the purchaſe money paid; but afterwards it was agreed between them, that the defendant ſhould keep the lighter, and pay the reſidue of the purchaſe money to the plaintiffs; and for this the preſent action was brought. At the trial, the defendant's counſel objected that the action could not be maintained, becauſe the plaintiff did not ſue as aſſignee, nor ſtate themſelves as ſuch in the declaration.

But Lord *Mansfield* over-ruled the objection. And afterwards, upon a rule for a new trial, his lordſhip ſaid: "The lighter was the property of the aſſignees, and, conſequently, the ſale by the bankrupt was a contract as their agent by operation of law, and on their account. Therefore it was not neceſſary that they ſhould ſtate themſelves to be aſſignees in the declaration: though in reſpect of the evidence in ſupport of the action, it might be incumbent on them to prove the trading, bankruptcy, and ſo forth; in ſhort, the whole of their caſe."

Willes, J. alſo thought, that the ſale by the bankrupt could be conſidered in no other light than as agent or ſervant to the aſſignees.

Aſhhurſt, J. ſaid: "That in the caſe of an action at the ſuit of an executor, it is clear, if the action be brought on a contract made by himſelf, reſpecting the goods of the teſtator, he need not name himſelf executor. Therefore I ſhoud doubt whether, in this caſe, it would be neceſſary for the plaintiffs to go into evidence of the trading, bankruptcy, &c. For here there was an actual treaty between the plaintiffs and the defendant, relative to the matter in litigation, and not merely a promiſe by implication of law. And if ſo the action is founded on an actual contract between the plaintiffs and the defendant, conſequently the plaintiffs

(*p*) *Cowp.* 569.

are

are entitled to recover *ſuo jure*. In which idea the court concurred: and refuſed the rule for a new trial.

If a bankrupt, before his bankruptcy, commence an action at law, ſuch action does not abate, but the aſſignees ſhould proceed in his name until after judgment, either interlocutory or final.

Thus, in the caſe of *Kretckman* v. *Beyer*, (*q*) in error, where the defendant, in error, having recovered a judgment againſt the plaintiff, in error, in the Court of *Common Pleas*, the latter brought a writ of error, which was duly iſſued, allowed, and ſerved. Afterwards the defendant, in error, became a bankrupt, and his aſſignees ſued out a *ſcire facias quare executionem non*, reciting the recovery below, and the writ of error.

Buller, J., "The *ſcire facias* is wrong either way. Firſt, as a *ſcire facias quare executionem non*, becauſe it appears from the recital, that a writ of error is depending; and, Secondly, as a *ſcire facias* to compel an aſſignment of errors, it is likewiſe wrong, even ſuppoſing it did not take notice of the writ of error depending; becauſe there has been a proceeding ſince the judgment. And the rule is, that the aſſignees cannot make themſelves parties to the record in any intermediate ſtage of the proceeding, but it muſt be immediately after judgment, though an interlocutory judgment is ſufficient for that purpoſe. Here the aſſignees ſhould have gone on with the writ of error in the bankrupt's name till judgment. Therefore the *ſcire facias* muſt be quaſhed.

7. *Of Payments, &c. made to or by a Bankrupt, When Protected.*

The legal effect of an act of bankruptcy committed by a trader, is to put it in the power of the commiſſioners to diveſt the property of the bankrupt by relation, which may go back to a great length of time, and avoid all acts done by the bankrupt, without regard to the fairneſs or fraud of them. So that a ſale of goods by the bankrupt, after the act of bankruptcy committed, is a

(*q*) 1 *Term Rep.* 463. *See alſo* Waugh v. Auſten, 3 *Term Rep.* 437.

ſale of the aſſignees' property, for which they may maintain *trover* or *aſſumpſit*.* And it is the ſame as to the payment of money; but the rigour of this rule has been relaxed by the legiſlature. For by the ſtat. 1 Jac. 1. c. 15. ſ. 14. it is enacted, "That no debtor of the bankrupt be hereby endangered for the payment of his or their debt, truly and *bonâ fide*, to any ſuch bankrupt, before ſuch time as he ſhall underſtand or know that he is become a bankrupt."

And by the ſtat. 19 Geo. II. c. 32. after reciting "Whereas many perſons within the deſcription of, and liable to the ſtatutes concerning bankrupts, frequently commit ſecret acts of bankruptcy unknown to their creditors and other perſons, with whom in the courſe of trade, they have dealings and tranſactions; and after the committing thereof, continue to appear publicly, and carry on their trade and dealings, by buying and ſelling of goods and merchandizes, drawing, accepting, and negotiating bills of exchange, and paying and receiving money on account thereof, in the uſual way of trade, and in the ſame open and public manner, as if they were ſolvent perſons, and had not become bankrupts: and whereas the permitting ſuch ſecret acts of bankruptcy to avoid and defeat payment, really and *bonâ fide* made in the caſes, and under the circumſtances above-mentioned, where the perſons receiving the ſame had not notice of, or were privy to ſuch perſons having committed any act of bankruptcy, will be a great diſcouragement to trade and commerce, and a prejudice to credit in general: it is enacted, that no perſon who is, or ſhall be really and *bonâ fide*, a creditor of any bankrupt, for or in reſpect of goods really and *bonâ fide* ſold to ſuch bankrupt, or for or in reſpect of any bill or bills of exchange really and *bonâ fide* drawn, negotiated, or accepted by ſuch bankrupt, in the uſual or ordinary courſe of trade and dealing, ſhall be liable to refund or repay to the aſſignee or aſſignees of ſuch bankrupt's eſtate, any money, which before the ſuing forth of ſuch commiſſion, was really and *bonâ fide*, and in the uſual and ordinary courſe of trade and dealing received by ſuch perſon of any ſuch bankrupt, before ſuch time as the perſon receiving the ſame ſhall know, underſtand, or have notice, that he is become a bankrupt, or that he is in inſolvent circumſtances."

* Vide *Co. Blkſt. Laws*, 571.

And

And by the ſtatute 46 Geo. 3. c. 135., reciting "whereas great inconveniences and injuſtice have been occaſioned by reaſon of the fair and honeſt dealings and tranſactions of and with traders being defeated by ſecret acts of bankruptcy, in caſes not already provided for, or not ſufficiently provided for by law: for remedy thereof, be it enacted, that in all caſes of commiſſions of bankrupt hereafter to be iſſued, all conveyances, by all payments by and to, and all contracts and other dealings and tranſactions, by and with any bankrupt *bonâ fide* made or entered into, more than two calendar months before the date of ſuch commiſſion, ſhall, notwithſtanding any prior act of bankruptcy committed by ſuch bankrupt, be good and effectual, to all intents and purpoſes whatſoever, in like manner as if no ſuch prior act of bankruptcy had been committed, provided the perſon or perſons ſo dealing with ſuch bankrupt had not at the time of ſuch conveyance, payment, contract, dealing, or tranſaction, any notice of any prior act of bankruptcy by ſuch bankrupt committed, or that he was inſolvent, or had ſtopped payment."

By ſection the ſecond, it is further enacted, "that in all caſes of commiſſions of bankrupt hereafter to be iſſued, all and every perſon and perſons with whom the bankrupt ſhall have really and *bonâ fide* contracted any debt or debts before the date and ſuing forth of ſuch commiſſion, which, if contracted before any act of bankruptcy committed, might have been proved under ſuch commiſſion, ſhall, notwithſtanding any prior act of bankruptcy may have been committed by the bankrupt, be admitted to prove ſuch debt or debts, and to ſtand and be a creditor under ſuch commiſſion, to all intents and purpoſes whatever, in like manner as if no ſuch prior act of bankruptcy had been committed by ſuch bankrupt; provided ſuch creditor or creditors had not, at the time of ſuch debt or debts being contracted, any notice of any prior act of bankruptcy by ſuch bankrupt committed."

By ſection the third, it is alſo enacted, "that in all caſes in which, under commiſſions of bankrupt hereafter to be iſſued, it ſhall appear that there has been mutual credit given by the bankrupt and any other perſon, or mutual debts between the bankrupt and any other perſon, one debt or demand may be ſet off againſt another, notwithſtanding any prior act of bankruptcy committed by ſuch bankrupt before the credit was given to, or the debt was contracted by ſuch bankrupt, in like manner as if no ſuch prior act of bankruptcy had been committed, provided ſuch credit was given to the bank-

rupt two calendar months before the date and ſuing forth of ſuch commiſſion, and provided the perſon claiming the benefit of ſuch ſet-off had not, at the time of giving ſuch credit, any notice of any prior act of bankruptcy by ſuch bankrupt committed, or that he was inſolvent, or had ſtopped payment: provided always, that the iſſuing of a commiſſion of bankrupt againſt ſuch bankrupt, although ſuch commiſſion ſhall afterwards be ſuperſeded, or the ſtriking of a docket for the purpoſe of iſſuing a commiſſion againſt ſuch bankrupt, whether any commiſſion ſhall have actually iſſued thereupon or not, ſhall be deemed notice of a prior act of bankruptcy for the purpoſes of this act, if it ſhall appear that an act of bankruptcy had been actually committed at the time of iſſuing ſuch commiſſion, or ſtriking ſuch docket."

By the 4th ſection it is enacted, "that all perſons againſt whom any commiſſion of bankrupt ſhall hereafter iſſue, and who ſhall be duly found bankrupt under the ſame, ſhall, upon obtaining his, her, or their certificate, be diſcharged of and from all debts by this act made proveable under ſuch commiſſion, and ſhall have the benefit of the ſeveral ſtatutes now in force againſt bankrupts, in like manner, to all intents and purpoſes, as if ſuch ſecret acts of bankruptcy had not been committed prior to the contracting of ſuch debts."

And by the laſt ſection of the act, it is enacted, "that no commiſſion of bankrupt that ſhall be hereafter iſſued, ſhall be avoided or defeated by reaſon of any act of bankruptcy having been committed by the perſon, or any of the perſons againſt whom ſuch commiſſion ſhall have iſſued, prior to the contracting the debt of the creditor, or any of the creditors, upon whoſe petition ſuch commiſſion ſhall have iſſued, if ſuch petitioning creditor had not any notice of ſuch act of bankruptcy at the time when the debt to him was contracted; but that ſuch commiſſion of bankrupt, and all the proceedings under the ſame, ſhall be valid and effectual, to all intents and purpoſes, notwithſtanding that ſuch prior act or acts of bankruptcy ſhall have been committed by ſuch bankrupt."

Upon this latter ſtatute no caſe has ariſen in any of our courts; but on the two former acts the following determinations have been made:

In

In the caſe of *Wilkins* and another, aſſignees of *Cann*, a bankrupt, *v. Caſey* (*r*), which was an action of *aſſumpſit*, as well for money had and received by the defendant, to and for the uſe of the plaintiffs, as aſſignees of *Thomas Cann*, after he became bankrupt, as alſo for the uſe of *Cann* before he became a bankrupt. On the trial of the cauſe a verdict was taken for the defendant, ſubject to the opinion of the Court of *King's Bench*, on the following caſe: "*Cann* was a clothier, and the defendant his factor in *London*; and their courſe of trade was this: *Cann* conſigned goods to the defendant, which were ſold by him, and he received 5 *per cent.* commiſſion, taking on himſelf the riſk of the debts. Goods to the amount of 222*l.* 18*s.* had, previous to the act of bankruptcy, been ſo conſigned to the defendant, and ſold by him; and he was indebted to *Cann* to that amount. On the 21ſt of *February*, 1794, *Cann* committed an act of bankruptcy, on which the commiſſion iſſued, by leaving his dwelling-houſe at *Redborough*, in the county of *Glouceſter*, to which he never returned. On the 22d of *February* he arrived in *London*, and on the ſame day called on the defendant, at his own houſe, in the *Old Change*, and, after informing him that he wanted to pay for a quantity of wool which he had bargained for in the country, requeſted the defendant to furniſh him with bills for the amount of the goods ſo ſold by him, as factor, and for which the defendant then ſtood indebted. The defendant thereupon accepted bills of exchange, which *Cann* then drew, payable to his own order, at two, three, four, five, and ſix months after date, and indorſed in blank by him, to the amount of 208*l.* 12*s.* and alſo delivered to him one other bill, dated 22d of *February*, 1794, drawn by the defendant, and payable to one *Terry*, for 14*l.* 6*s.*, making together the ſum of 222*l.* 12*s.* the whole balance due to *Cann* from the defendant, but for which no receipt or acknowledgment was given. *Theſe bills were diſcharged by the defendant as they became due.*"

The Court were of opinion that this payment was protected by the ſtat. 1 Jac. 1. c. 15. ſ. 14.

Lord *Kenyon*, Ch. J. ſaid, "This is as clear a caſe as can be ſtated. If we had an election given us for the firſt time to put either a rigid or a liberal conſtruction on the ſtatute of *James*, I ſhould not heſitate to ſay that we ought to put a liberal conſtruction upon it; for the object of it was to protect certain payments

(*r*) 7 *Term Rep.* 711.

made to a bankrupt, that common ſenſe and juſtice required ſhould [illegible] valid payments, and in this inſtance to correct the [illegible] the bankrupt laws. Now if the defendant had given [illegible] goods in exchange for theſe at the time, that would have been a payment to all intents and purpoſes, though not made in monies numbered: and it has always been holden that giving a bill of exchange is deemed a payment in ſatisfaction, provided the bill be paid when due."

Upon the ſtat. 19 Geo. II. c. 32. it has been determined that where the holder of a bill of exchange gives time to the acceptor, on a promiſe to pay intereſt; and, after a ſecret act of bankruptcy of the latter, the holder, without knowing of the bankruptcy, receives the amount of the bill, with intereſt, from the bankrupt, ſuch payment is not protected by that ſtatute.

Thus, in the caſe of *Vernon* and others, aſſignees of *Tyler*, a bankrupt, *v. Hall*, (*s*), which was an action brought by the aſſignees, to recover 570*l.* paid by the bankrupt to the defendant, after the bankruptcy. The act of bankruptcy was proved on the 2d of *May*, 1785; but it was unknown to the defendant, as well as to ſeveral of her other creditors at that time. Two months prior to the bankruptcy, the defendant ſold an eſtate to one *Uterſon*, who, in order to pay for it, had drawn a bill of exchange to that amount on the bankrupt, in favour of the defendant, payable the 7th of *February*, in the ſame year. When it became due, the defendant applied for it, and was told that it was not convenient at that time to pay; but if he would permit it to remain in the bankrupt's hands, ſhe would allow him intereſt on it. To this he aſſented, and on the 22d of *May*, 1785, applied for payment, which he received, without knowing of the bankruptcy.

It was contended that the payment of the bill was made in the ordinary courſe of buſineſs, and was therefore protected by the ſtat. 19 Geo 2. c. 32.

But the Court were clearly of opinion that it was not ſuch a payment, in the ordinary courſe of buſineſs, as came within the proviſion of that ſtatute; for they conſidered the tranſaction as a loan of money at intereſt, which became a debt.

(*s*) 2 *Term Rep.* 643.

So,

So, in the caſe of *Bradley* and another, aſſignees of *T. Bradley*, a bankrupt, *v. Clark* (*t*), which was alſo an action of *aſſumpſit* for money had and received. The facts were theſe: *T. Bradley* being indebted to the defendant, as a common carrier, in the ſum of 44*l.* for carriage of goods belonging to *T. Bradley*, and in which he dealt in the way of his trade, the defendant, on the 24th of *November*, 1791, cauſed *T. Bradley* to be arreſted for ſuch debt, who thereupon paid the ſame to the defendant, the defendant not then knowing that *T. Bradley* had committed any act of bankruptcy, or was in inſolvent circumſtances. An act of bankruptcy had, however, been committed by *T. Bradley*, on the 17th of *November*, 1791, and a commiſſion of bankrupt was thereupon afterwards iſſued againſt him on the 23d of *December* following: and it did not appear that he had carried on any trade after he had committed the ſaid act of bankruptcy.

The *Court* determined that this caſe did not fall within the ſtat. 19 Geo. II. c. 32. and therefore judgment was given for the plaintiffs.

Lord *Kenyon*, Ch. J. ſaid, "In this caſe we are called upon to put a conſtruction on the ſtatute 19 Geo. II., and as it is a remedial law, I think we ſhould give effect to it as far as the words of the act warrant. But it is clear that the legiſlature did not mean to extend this remedy to all caſes: had ſuch been their intention, they would have ſaid ſo in expreſs terms; inſtead of which they have choſen to uſe particular words, and to confine the remedy to particular caſes. The ſtatute only extends to two caſes; of which this is neither. Whether or not it would have been wiſe to have extended this proviſion to all caſes, I will not preſume to determine, though I cannot refrain from obſerving that had that been the caſe, all the property of a bankrupt might be conveyed to one creditor, to the excluſion of the reſt. In determining on this act of parliament, it is ſufficient to ſay that this caſe is not within the words, nor (as far as I can collect,) the intention of the act; though had it clearly and indiſputably appeared to have come within the meaning of the act, I ſhould have been inclined to have extended it to this caſe."

Buller, J. ſaid, "On this ſtatute the caſe of *Vernon* v. *Hall* (*u*), is deciſive. There the bill of exchange had been drawn on the

(*t*) 5 *Term Rep.* 197. (*u*) *Ante* 438.

bankrupt, who, when it became due, requeſted time of the holder (the defendant), ſaying, it was not convenient to her to pay it at that time, but promiſing to pay intereſt for it, if he would permit it to remain in her hands; and after, and without knowing of the bankruptcy, the defendant received the amount of it: but though the debt continued due under the bill, the Court ſaid it was not a caſe within the ſtatute; for when the defendant agreed to let the money remain at intereſt, it became a loan of ſo much to the bankrupt. Now that is a much ſtronger caſe than the preſent; becauſe there the debt originally aroſe on a bill of exchange in the courſe of trade. With regard to the conſtruction of ſtatutes, according to the intention of the legiſlature, we muſt remember that there is an eſſential difference between the expounding of modern and ancient acts of parliament. In early times the legiſlature uſed (and I believe it was a wiſe courſe to take), to paſs laws in general and in few terms: they were left to the courts of law to be conſtrued ſo as to reach all the caſes within the miſchief to be remedied. But in modern times great care has been taken to mention the particular caſes in the contemplation of the legiſlature, and therefore the courts are not permitted to take the ſame liberty in conſtruing them as they did in expounding the ancient ſtatutes."

So, in the caſe of *Pinkerton* and others, aſſignees of *Gale*, a bankrupt, *v. Marſhall* (*u*), which was alſo an action of *aſſumpſit*, for money had and received to the uſe of the plaintiffs, as aſſignees of *Gale*; and the circumſtances were as follow: At the ſittings after *Hilary* term, 1793, *Marſhall*, who was a ſhip-owner, recovered a verdict againſt *Gale*, who was a merchant, in an action on a charter party, for 428*l.* 11*s.* 11*d.* Early in the month of *April*, in the ſame year, *Gale* committed an act of bankruptcy; afterwards, *Marſhall* having had no notice of the bankruptcy, was requeſted by *Gale* to give him time for the payment of the ſum recovered by the verdict, inſtead of immediately entering up judgment, and taking out execution. To this *Marſhall* conſented, on receiving a bill of exchange, drawn by *Gale*, in his favour, on one *Younghuſband*, who was a debtor of *Gale's* for that ſum, at four months after date, and on payment of the coſts to the attorney. When the bill became due, it was paid by *Younghuſband*,

(*u*) 2 *H. Bl.* 234.

by

by another bill drawn on Sir *James Eſdaile* and Co., the amount of which, together with the coſts, this action was brought to recover.

The Court held, that this payment was not protected by the ſtat. 19 Geo. II. c. 32. They ſaid the authorities of *Vernon* v. *Hall* (*w*) and *Bradley* v. *Clark* (*x*) were deciſive of the point in diſpute, particularly the former, where, as well as in this inſtance, a perſonal credit was given to the bankrupt; that if the payment by the bankrupt, in thoſe caſes, could not be ſupported, neither could it be in the preſent.

So, (*y*) where a trader, ſubſequent to an act of bankruptcy, being arreſted and detained in priſon at the ſuit of ſeveral creditors, ſent for all his creditors but one, and paid their debts in full: but no other circumſtance occurred from which it could be preſumed that they knew of his bankruptcy, or inſolvency: it was determined that ſuch payments were not protected by the 19 Geo. II. c. 32.

But it has been decided that payment of a bill of exchange to a creditor under an arreſt, after a ſecret act of bankruptcy, is protected by the above ſtatute.

Thus, in the caſe of *Cox* and others, aſſignees of *Emmott* a bankrupt v. *Morgan*, (*z*) which was an action of *aſſumpſit* for money had and received to the uſe of the plaintiffs. The commiſſion was dated the 14th of *Auguſt*, 1799. The act of bankruptcy was the lying in priſon hereafter ſtated. *Emmott* was arreſted at the ſuit of one *Dixon* on the 31ſt of *October*, 1798, and committed to the *Fleet* on that arreſt on the 6th of *November*. He remained in the *Fleet*, on that account, till the 16th of *February*, 1799, when he was diſcharged. *Emmott* had a partner named *Bray*, who was abroad before he went to the *Fleet*; the partnerſhip was indebted to *Morgan*, the defendant, in the ſum of 44*l.* 13*s.* 9*d.* on a bill of exchange accepted by *Emmott* and *Bray*, on the partnerſhip account. The bill not being paid, *Morgan* proceeded by original againſt *Emmott* and *Bray*, for the purpoſe of outlawing *Bray*, on the 14th of *November*, 1798, and em-

(*w*) *Ante* 438. (*x*) *Ante* 439. (*y*) Southey *and another* v. Butler, 3 *Bos. & Pul.* 237.

(*z*) 2 *Bos. & Pul.* 398. *See alſo* Holmes *v.* Wennington, 2 *Bos. & Pul.* 399. *n. a. S. P.* Sed Vide 7 *Eaſt Rep.* 160.

ployed

ployed a ſheriff's officer to arreſt *Emmott*, who could not find him. An *alias* was taken out, and the ſheriff's officers went to his houſe, and was told he was in the country. He afterwards met with him at his houſe, and arreſted him at the ſuit of *Morgan*, on 23d of *February*, 1799. He told the officer he was juſt returned from *Portſmouth*. *Emmott* immediately paid *Morgan*'s attorney the 44*l.* 13*s.* 9*d.* and 1*l.* 5*s.* for intereſt which was paid over to *Morgan*. Neither *Morgan*, nor any one concerned for him perſonally knew that *Emmott* had been in the *Fleet*, had committed an act of bankruptcy, or that he was in inſolvent circumſtances.

The Judges, (*a*) not being unanimous, delivered their opinions *ſeriatim* as follow:

Chambre, J. "The only queſtion in this caſe is, whether the payment of the money for which the action is brought, and which was made by the bankrupt to the defendant after an act of bankruptcy, and under the circumſtances ſtated in the caſe, is a payment protected by the ſtat. 19 Geo. II. c. 32. ſ. 1. or not? I am of opinion, that the payment is not protected by the ſtatute. I ſhould have given this opinion with much more ſatisfaction to myſelf if it had been fortified by thoſe of the reſt of the court; but I ſtand ſingle in my opinion here, both my brothers thinking differently from me upon the ſubject, and I am alſo oppoſed by the authority of a determination of the Court of *Exchequer*, which (though there are material circumſtances in the preſent caſe which did not occur in that) is a caſe in point, as to the general queſtion of a payment under an arreſt being protected by the ſtatute. That deciſion too is ſtrengthened by, and, in a conſiderable degree, founded upon a determination of Lord *Loughborough* at *Niſi Prius*, which I learn from my brother *Heath*, was confirmed in this court. I find from ſome notes, I have procured of what was ſaid by the court at *Niſi Prius*, that a writ, in that caſe, had been ſued out, but whether the party was arreſted I do not know. I ſuppoſe he was. I am ſenſible of the weight of theſe authorities, and of the reſpect that is due to them, though there are diſtinguiſhing circumſtances in the preſent caſe, but if it was right to extend the act ſo far as is done in thoſe caſes I do not

(*a*) Heath, Rooke, *and* Chambre. *Lord* Eldon *was not in court during the argument, and therefore did not deliver any opinion upon the caſe.*

know

know what diſtinction is to be relied on; I feel myſelf therefore under the neceſſity of inquiring into the foundation of thoſe deciſions. I do it with the utmoſt diſtruſt of my own judgment, but if I find no ambiguity in the act, and think (however erroneouſly) that the act has not been expounded but contradicted, I feel it my duty to adhere to the authority of the ſtatute.

Before the paſſing of this act I take the law to have been clearly ſettled, and ſo the act itſelf ſuppoſes, that when an act of bankruptcy had been committed, and a commiſſion iſſued in conſequence of it, the property of the bankrupt was by relation ſo veſted in the aſſignees, that any diſpoſition of it by the bankrupt, after the act of bankruptcy was void as againſt the creditors however fairly ſuch diſpoſition was made, and without any regard to its being a voluntary or compulſory payment. Payments to a bankrupt ſtand upon a very different footing; and with reaſon. Even after notice of the act of bankruptcy the payment may be good, if made under legal compulſion, for an act of bankruptcy is no defence againſt the action of the perſon who commits it, unleſs a commiſſion is taken out againſt him, and it is not the fault of the bankrupt's debtor if the delay of the creditors in ſuing out the commiſſion deprives him of his defence; he ought not to increaſe the fund by paying his debt twice over. But compulſion againſt the bankrupt, however it may operate in protecting payments before the act of bankruptcy, while the property is in the bankrupt himſelf, (and which it does by excluding the imputation of fraud,) can have no effect in protecting payments after the act of bankruptcy. The bankrupt himſelf does not ſuffer by the compulſion, and the compelling creditor has only to refuſe what he ought not to have taken, and come in for his ſhare, in common with the other creditors. The queſtion therefore muſt turn upon the operation of the ſtatute, and we are only to ſee whether the payment on which the preſent queſtion ariſes is there deſcribed. The recital of the ſtatute is not immaterial, it ſtates the frequent commiſſion of ſecret acts of bankruptcy unknown to creditors, and others with whom the bankrupts have dealings in trade, and their continuing afterwards to appear publicly, and carry on their trade and dealing, by buying and ſelling, drawing, accepting, and negotiating bills, and paying and receiving money on account thereof in the uſual way of trade, and in the ſame open and public manner as if they were ſolvent perſons. It then recites the diſcouragement to trade, and prejudice

dice to credit, from permitting payments to be defeated in the caſes, and under the circumſtances above-mentioned; and enacts that no perſon, who is or ſhall be really and *bonâ fide* a creditor of any bankrupt for or in reſpect of goods really and *bonâ fide* ſold to ſuch bankrupt, or for or in reſpect of any bill or bills of exchange really and *bonâ fide* drawn, negotiated or accepted by ſuch bankrupt in the uſual and ordinary courſe of trade and dealing, ſhall be liable to refund or repay to the aſſignee or aſſignees of ſuch bankrupt's eſtate, any money which before the ſuing forth ſuch commiſſion was really and *bonâ fide*, and in the uſual and ordinary courſe of trade and dealing received by ſuch perſon of any ſuch bankrupt, before ſuch time as the perſon receiving the ſame, ſhall know, underſtand or have notice that he is become a bankrupt, and that he is in inſolvent circumſtances. The nature of the debt in the caſe before the court is not denied to be ſuch as the ſtatute deſcribes, but is the mode of payment ſuch as the ſtatute requires? The debt has been really paid. It is ſtated (and ſo we muſt take the fact to be, though I think the circumſtances would have warranted a contrary concluſion) to have been paid without the defendant's knowledge of bankruptcy or inſolvency; but that is not all that the ſtatute requires. It is further required, to be the uſual and ordinary courſe of trade and dealing, and on thoſe words the queſtion, or, at leaſt, my difficulty ariſes. I have endeavoured to obtain an account of the two authorities wherein a payment under an arreſt has been held to be protected, and to my great diſappointment I find little or no argument applied to the very important words I have laſt alluded to, but a good deal to a circumſtance on which the ſtatute is totally ſilent, namely, a compulſive payment, which was undoubtedly bad before the act. In the caſe at *Niſi Prius*, the queſtion is conſidered as a queſtion of notice of inſolvency, and what is preſumptive evidence of ſuch notice, or of colluſive payments and preferences. It is ſaid, that a knowledge of the debtor's being poor, or in failing circumſtances would not vitiate the payment, and that compulſive payments were meant by the act to be protected. They are protected before the act of bankruptcy, but the act of Parliament, I think, has no view whatever to compulſive payments, either before or ſubſequent to the act of bankruptcy. The argument of the Court of *Exchequer*, though expreſſing great doubts on the ſubject, diſpoſes of the language of the act, on which the queſtion ariſes, in a way that would

ſolve every difficulty in every caſe; it cuts the knot at once. It is ſaid to be eaſy to aſcertain what is a debt contracted in the courſe of trade, and therefore the deciſion in *Vernon* v. *Hall* (*b*) is approved of, but as to payments in the uſual and ordinary courſe of trade and dealing, it is ſaid to be difficult to draw the line. Then an inaccurate definition of ſuch payments, ſuppoſed to have been uſed in argument by the counſel, is controverted, and we hear no more of thoſe words, or of any conſtruction of them, they are in effect expunged from the ſtatute, and what follows amounts only to this, that the circumſtance of an arreſt, can only be uſe as evidence to be left to a jury, of notice of inſolvency, and that if not evidence of ſuch notice it is nothing but diligence to get payment, a means to quicken the payment, which ought not to defeat it, and that it is ſufficient that there is no improper motive on either ſide. As to the difficulty of defining what are payments in the uſual and ordinary courſe of trade and dealing, without feeling much of that difficulty it may be ſufficient for me to ſay, that it is not neceſſary in deciding one caſe upon an act of Parliment to decide all the caſes that may poſſibly happen, and that if, in the caſe before us, we can ſay, that the payment was not in the uſual and ordinary courſe of trade and dealing, we have no occaſion to go further; I have no difficulty in ſaying, that I admit that diligence in procuring payment of a debt, uſed in the common and ordinary way, would not of itſelf defeat a payment; I have as little difficulty in ſaying, that it is no part of the purview of the act to afford particular protection to diligence or activity in recovering debts; on the contrary, the intention is manifeſtly to protect only thoſe who are deluded by ſpecious appearances of ſolvency and credit; and though it be true that improper motives or knowledge of inſolvency may vitiate payments otherwiſe good, yet purity of motives alone, without the concurrence of the other circumſtances required by the ſtatute, will not give validity to ſuch payments, made after the act of bankruptcy. The intention of the act is not generally to authorize creditors to retain what they had received without knowledge of inſolvency: it is to place creditors of a particular deſcription, and under particular circumſtances in a better ſituation than the general maſs of creditors. That being the object of the act, it was neceſſary, in order to prevent litigation, and the extenſion of the

(*b*) *Ante* 438.

act

act to persons not intended to receive the benefit of this preference, to describe with precision the condition of those who were to have the preference; the legislature have done it with guarded attention, by using as definite and restrictive language as could well be found to answer that purpose. To prevent the effect of any ambiguity in the meaning of the word 'usual' they add the word 'ordinary.' The payment must not only be in that case of trade and dealing which is usual, but it must be that which is in the ordinary use. The propriety of confining the act to its declared objects is distinctly stated by Lord *Kenyon*, in the case of *Bradly* v. *Clarke*. (*c*) The case of *Vernon* v. *Hall* (*d*) (if cases were necessary) appears to me a strong authority, that the act ought not to be extended in construction. If it be said that that case applies only to the nature of the debt, which was held to be turned into a loan, I answer, that the words of that part of the clause which describes the nature of the debt, as to the course of the trade, are exactly the same with those which relate to the mode of payment; the debt there having been also contracted as described in the act, the decision may properly refer to the mode of payment; but whether it does or not, the case proves, that the act ceases to operate when circumstances, not referable to a trading, are indroduced. As a remedial act I am ready to give it every extension by construction that remedial acts are entitled to, but no principle applying to the construction of remedial acts authorises the extension of them contrary to the intention of the legislature. It may also be remarked, that all the other bankrupt laws are remedial; that this particular act trenches upon the great leading principle of the bankrupt laws, that of securing the property for equal distribution, by giving a preference to a particular class of creditors; and therefore is not peculiarly entitled to have its operation extended by construction. It is time to resort to the facts of the case, and see how far they answer the description contained in the act. When the bankrupt had been publicly and openly carrying on his business, we no where learn, we have no act of trading stated, but the acceptance of the bill as a partner with another person. After that he is arrested for debt, goes to goal, and lies there near four months. After that act of bankruptcy it is not in evidence that he ever appeared publicy, and carried on his trade and dealing in the usual way of trade, and in the same

(*c*) *Ante* 439. (*d*) *Ante* 438.

open

open and public manner as if he was a ſolvent perſon, all which circumſtances are by the preamble ſuppoſed to attach themſelves to the ſituation of the bankrupt, whoſe payments were meant to be ratified by this act; on the contrary, he was arreſted by the defendant within a week after his diſcharge, having, according to his own account, gone off to *Portſmouth* in the meantime. Was the defendant deluded by any ſpecious appearances of ſolvency at the time of the payment? He had ſued out an original againſt the two partners very ſoon after the bankrupt went to priſon. The other partner was gone out of the kingdom. The defendant could not be found by the officer; an *alias* became neceſſary; he is met with accidently, not having been found at his own houſe, and arreſted; to deliver himſelf from that arreſt he makes the payment. Can we ſay this is a payment made by a perſon carrying on his buſineſs as a ſolvent man, in an open and public manner, or which comes more directly to the enactment of the ſtatute; was this a payment in the uſual and ordinary courſe of trade and dealing? Are ſheriff's bailiffs, the perſons who tranſact the affairs of merchants and traders in the ordinary courſe of trade and dealing? If this will do where are we to ſtop? This is a caſe where payment has been made under an arreſt, but why ſtop there? will not the argument go equally to protect payments after ſuing out execution? If, indeed, the ſheriff ſeizes and ſells the effect, that may not be conſidered as a payment by the party, but I can find no difference between the preſent caſe, and caſes where the bankrupt pays the money to prevent the ſeizure, or to redeem the goods after ſeizure, or even to redeem his perſon after he is taken upon the *ca. ſa.*: and payments under all theſe circumſtances we are deſired to conſider, as made under appearances of perfect ſolvency on the part of the bankrupt, and in the ordinary courſe of trade. I feel the weight of the authorities againſt the opinion I am delivering, and I am fully aware of the propriety of adhering to former deciſions, and the miſchief of lightly departing from them; but I am in ſome degree relieved from their preſſure by theſe conſiderations, that the attainment of certainty is the chief reaſon for ſubmitting to the authority of ſuch determinations, as are not perfectly ſatisfactory in reſpect of the arguments on which they were founded, and that in my view of the caſe before us, certainty will be better attained by bringing back our attention to the language and meaning of the act of Parliament, which is to be the rule of our conduct, than by following

following the determinations; to what uncertainty they lead we have an inſtance in the late attempt in the Court of *King's Bench*, to bring payments to carriers for the carriage of goods within the protection of the ſtatute, which I can only attribute to the great latitute of conſtruction uſed in the former caſes. On theſe grounds I feel myſelf bound to give my opinion, that the payment in queſtion is not ſupported by the ſtat. 19 Geo. II., and that the plaintiffs, the aſſignees, are entitled to recover."

Rooke, J. "In this caſe, a bill drawn *bonâ fide*, and in the ordinary courſe of trade has been paid after an act of bankruptcy, immediately upon the bankrupt's being arreſted, and neither the creditor, nor any one concerned for him, knew that the bankrupt had committed an act of bankruptcy, or was in inſolvent circumſtances. The queſtion is, whether this payment being immediately upon an arreſt is a payment in the ordinary courſe of dealing? or whether being a payment by legal compulſion, it is not out of ſuch ordinary courſe? In deciding this queſtion, I think, I ought to look to the effect of uſing legal diligence in other caſes reſpecting bankruptcy, and to ſee in what light courts of law have conſidered it. The ſtatute 1 Jac. 1. c. 15. ſ. 14 provides, that no debtor of a bankrupt be hereby endangered for the payment of his debt truly and *bonâ fide* to any bankrupt before ſuch time as he ſhall underſtand or know that he is become bankrupt. The ſtrict conſtruction of this ſtatute would be, that if he did underſtand or know it, his payment ſhould be endangered: but courts of law have held, that if a creditor has notice of a bankruptcy, and pays under legal coercion he ſhall be protected. See 3 *Keble* 231. *Freeman* 349. *S. C.* 2 *Term Rep.* 479. Here then a payment by legal compulſion is ſupported, even againſt the obvious conſtruction of the ſtatute, and hence, I conclude, that in caſes of bankruptcy, payments by compulſion of law are favoured and protected. The words of the ſtatute 19 Geo. II. are very different from thoſe of 1 Jac. 1.; but they do not expreſsly avoid payment by legal coercion, nor exclude them from protection; and if excluded, they muſt be excluded by implication only; and ſuch implication if applied to the whole clauſe on which this queſtion ariſes will go a great way, indeed, to invalidate *bonâ fide* payments to honeſt creditors. The ſtatute 19 Geo. II., ſo far as reſpects bills, requires that they be drawn, negotiated, or accepted really and *bonâ fide*, and in the uſual

and

and ordinary courſe of trade and dealing. Now if an arreſt ſo far changes the ordinary courſe of trade and dealing, as to affect the payment of a bill, it will equally affect the drawing, the negotiating, or the accepting it. The conſequence will be, that if a debtor having committed a ſecret act of bankruptcy is arreſted and gives or accepts a bill payable at a future day, and actually pays it, and then a commiſſion iſſues, the aſſignees may recover back the money. This will be a very dangerous conſtruction, and will render all tranſactions under an arreſt very precarious. It has been ſuggeſted, that payment under arreſt is not to be favoured, becauſe the arreſt is a circumſtance which ſhould raiſe a ſuſpicion of inſolvency. If ſo, by the ſame reaſoning, payment under a threat of arreſt will be equally ſuſpicious; for whether a man pays before the bailiff arreſts him or after, if he pays under terror of a goal, he pays under compulſion; and the compulſion in either caſe may with equal reaſon raiſe a ſuſpicion of inſolvency. If a threat to arreſt does not alter the nature of a payment, and take it out of the ordinary courſe of dealing (and it has not been contended in argument that it does) it will be difficult to aſſign any ſound reaſon why an actual arreſt ſhould do ſo. There are ſtages in the proceedings between the threat and the actual arreſt which are as much out of the ordinary courſe of dealing as the arreſt itſelf; and what line ſhall we draw by our diſcretionary conſtruction where the legiſlature has drawn none? Shall we inquire, is the writ purchaſed? is it delivered to the bailiff? is the bailiff in the houſe? has he ſeized the debtor? or is he only in the act of doing it? When is it that the ordinary courſe ceaſes, and the extraordinary begins? As the words 'uſual and ordinary courſe of trade and dealing' do not neceſſarily exclude tranſactions, either by menace, or by compulſion of legal proceſs, I am not diſpoſed to extend them to either caſe; they are general words, and they may be intended to apply to the caſe of undue preference: for a man may be diſpoſed to pay a debt really and *bonâ fide* due, from a deſire to favour a particular creditor, and may go out of the ordinary courſe of trade and dealing to do ſo. Payments under legal compulſion having been favourably conſidered by our courts in the conſtruction of 1 Jac. 1., I think they ought to be as favourably conſidered in the conſtruction of 19 Geo. II. which is in *pari materiâ*. Legal coercion is a courſe which the law allows, and ſurely if we attend to the literal conſtruction of the ſtatute, it is neither unuſual nor extraordinary,

nor out of the ordinary courſe of dealing for a creditor to be driven to arreſt his debtor, or to uſe legal diligence in order to procure payment. The taking out legal proceſs does not depend ſo much on the real credit of the debtor, as on the patience or impatience of the creditor. If a creditor is obliged to call three or four times on a debtor before he can obtain payment, it may awaken ſuſpicion. If a patient creditor does this, and receives payment, he is protected. Shall we ſay that if a harſh creditor calls once, and then arreſts and is paid, he ſhall refund? Shall we conſider his ſeverity as a proof of his debtor's inſolvency? The ſtatute has given one poſitive criterion, *viz.*, knowledge of the bankruptcy or inſolvency; and has alſo required that the tranſaction ſhall be in the ordinary courſe of trade and dealing; but as it has not defined what that ordinary courſe muſt be, the courts of law muſt, as caſes ariſe, declare what is within the ordinary courſe, and what is not. I have now given my reaſon why, upon general principles, I think that arreſt or legal diligence is not within the reſtriction of the ſtatute; but if it were a doubtful point how the ſtatute ſhould be conſtrued, I muſt conſider myſelf as bound by the conſtruction it has already received in two courts in *Weſtminſter Hall.* The caſe of the aſſignees of *Jones* v. *Lingard* was tried before Lord *Loughborough*, and afterwards was heard in this court on a motion for a new trial. There the creditor brought an officer with the writ into the ſhop, and then the debt was paid, and the payment was held to be good. The caſe of *Holmes* v. *Wennington*, (*e*) was decided on ſolemn argument in the Court of *Exchequer.* Theſe caſes have been cited in the Court of *King's Bench*, in the caſe of *Bradley* v. *Clarke*; and no doubt was hinted in that court as to the propriety of the deciſions; yet Lord *Kenyon* particularly notes, how right it is to adhere to the words of the ſtatute. We are alſo informed, that the late Mr. Juſtice *Buller* ruled the ſame point on the *Northern Circuit*, and that no application was made for a new trial. For theſe reaſons, I think the verdict ſhould be entered for the defendant."

Heath, J. "The queſtion is, whether a payment by a tradeſman, who has committed a ſecret act of bankruptcy, to a creditor who has arreſted him, and who has no knowledge of the act of bankruptcy, or of the inſolvency of his debtor, be good within the ſtatute of 19 Geo. II.?

(*e*) 2 *Bos. & Pul.* 399. *n. a.*

Before

Before that ſtatute, it was the policy of the bankrupt laws, in all caſes, to deprive the bankrupt, by relation to his act of bankruptcy, of the power of diſpoſing of his effects. In order to avoid the inconveniences ariſing from too rigid an obſervance of this principle, the act in queſtion was made. It has always been conſidered as a remedial ſtatute, and, as ſuch, is entitled to a liberal conſtruction. In order to give validity to the payment of a bill of exchange, it muſt be drawn and the money received in the ordinary courſe of trade. In my apprehenſion this bill had both requiſites. Of the conſideration of the bill there is no queſtion. The bill was due before it was paid, and it was not officiouſly paid by the bankrupt. The objection is, that the payment was made under the terror of an arreſt. If the bill had been paid before it became due, or if the bankrupt had ſolicited the defendant to receive the money, thoſe circumſtances would have vitiated the tranſaction, and would have brought the caſe within the ſtatute. It is objected that the payment is under an arreſt. If this were to be the ground of the deciſion, it would introduce great uncertainty: for if an arreſt will vitiate a payment, why not a menace? and if a menace, why not a promiſe of ſome collateral advantage? There are two principles on which I ſhall found my judgment: the firſt is the general policy of the law, that the uſing of legal diligence is always favoured, and ſhall never turn to the diſadvantage of the creditor. The maxim *vigilantibus et non dormientibus ſuccurrunt jura*, is one of thoſe that we learn on our earlieſt attendance in *Weſtminſter Hall*. The ſecond principle is, that this ſtatute ſhall receive a conſtruction agreeable to the general policy of the bankrupt laws, namely, that it ſhall not be in the power of the bankrupt to diſpoſe of his effects, after his bankruptcy, in ſuch a way as to give a preference to a favourite creditor. Now if payment under an arreſt, though otherwiſe in a due courſe of trade, were to be held bad, the conſequence might be, that if in the ſame day, or at the ſame inſtant, two creditors ſhould apply for payment of their reſpective demands, the bankrupt might make a good voluntary payment to one creditor, and refuſe payment to the other till there had been ſome menace, or actual arreſt made, to vitiate the payment. I can ſee no inconvenience from this conſtruction. If it be ſaid that the creditors under an arreſt might ſweep away all the effects of the bankrupt; ſo may the favoured creditor under a voluntary payment; and the latter miſchief is the moſt to be apprehended. Therefore I am of

opinion, as well upon the general policy of the law that favours the legal diligence of creditors, as on the particular policy of the bankrupt laws, that this is a good payment, and protected by the ſtatute of 19 Geo. II. If the caſe were doubtful, the deciſions ought to put an end to the controverſy. I allude to the caſes of *Calvert* v. *Lingard*, in this court, and of *Holmes* v. *Wennington*. I cannot paſs over in ſilence the opinion and deciſion of the late Mr. Juſtice *Buller*, whoſe judgment will always have the greateſt weight with me. The queſtion is, whether this be a doubtful caſe? A caſe may not be the leſs doubtful becauſe I entertain no doubt on the ſubject; but that is doubtful concerning which learned men differ. For theſe reaſons I am of opinion that the plaintiff is not entitled to recover, and that a verdict ſhould be entered for the defendant."

But payment of a debt by a garniſhee, out of the bankrupt's eſtate, under a judgment of the *Mayor's Court*, in *London*, on a foreign attachment, is not protected by the ſtat. 19 Geo. II. c. 32. ſ. 1. and the aſſignees of ſuch bankrupt, under a *third* commiſſion iſſued againſt him, may ſue for and recover back the money ſo paid, although the bankrupt, who had obtained his certificate under two former commiſſions, had not paid 15*s.* in the pound under the *ſecond*; in which caſe his future effects remain liable to that extent to his creditors under the ſecond commiſſion.

Thus, in the caſe of *Hovil* and others, aſſignees of *Wardell*, a bankrupt, *v. Browning*, (*f*) which was an action of *aſſumpſit* for money had and received, a verdict was found for the plaintiffs for 367*l.* 16*s.* 6*d.*, ſubject to the opinion of the Court of *King's Bench*, on the following caſe, which ſtated, "That in *November*, 1802, *Wardell*, being a trader, became indebted to the defendant in 367*l.* for goods ſold and delivered, and, on the 27th of *January*, 1803, ſet ſail in a ſhip, of which he was the ſole owner, with a cargo for the *Weſt Indies*, having only a few days before committed a ſecret act of bankruptcy. In *July*, 1803, inſurances to the amount of 3400*l.* were effected for the bankrupt by Mr. *De Beaume*, a policy broker reſiding in *London*; and in the ſame month the ſhip and cargo were captured by the *French*. On the 20th of *January*, 1804, the defendant brought an action in the

(*f*) 7 *Eaſt Rep.* 154.

Mayor's

Mayor's Court of *London* againſt the bankrupt, and attached 367*l.* in monies numbered in the hands of *De Beaume*, who had received the amount of the policies of inſurance from the underwriters; and the defendant having, on the 28th of the ſame month, obtained a regular judgment by default in that action, received 367*l.* in that action from *De Beaume*. The bankrupt returned to *England* in *February*, 1804; and on the 9th *March* following a commiſſion of bankrupt was iſſued againſt him, under which the plaintiffs were choſen aſſignees, and an aſſignment to them was regularly executed. *De Beaume* retained from the plaintiffs, as ſuch aſſignees, out of the monies he had collected on the policies, the amount of the payment he had made to the defendant. *Wardell* had been a bankrupt twice before, (*viz.*) once in the year 1786, and again in the year 1788; and had obtained his certificate under thoſe commiſſions, but had not paid a dividend of 15*s.* in the pound under the laſt of them; and his creditors at that time ſtill remained unſatisfied. The queſtion for the opinion of the Court was, whether the plaintiffs were entitled to recover?

The *Court* were of opinion, firſt, that this was not a payment protected by the ſtatute; and, ſecondly, that the future eſtate of the bankrupt only remained liable to the claims of his individual creditors under the *ſecond commiſſion*, not having received 15*s.* in the pound, which they might reſpectively ſue for as in other caſes; but that it could not prevent the veſting of the bankrupt's eſtate in the aſſignees under a third commiſſion, for the benefit of all the creditors.

Lord *Ellenborough*, Ch. J. ſaid, "I think that this was not a payment by the bankrupt; for the words of the ſtatute are, "that no creditor ſhall be liable to refund to the aſſignees any money which, before the iſſuing of the commiſſion, was really and *bonâ fide*, and in the uſual and ordinary courſe of trade and dealing received by ſuch perſon of any ſuch bankrupt, before ſuch time," &c. If it had been neceſſary to have decided the queſtion on which the Court of *Common Pleas* were divided in opinion, in the caſe of *Cox* v. *Morgan*, (*g*) I ſhould have wiſhed to have taken more time

(*g*) *Ante* 441.

to conſider it, eſpecially as the opinion of the majority of that Court is fortified by antecedent caſes; though I confeſs that, at firſt ſight of the ſtatute, I ſhould be more inclined to the conſtruction put upon it by the ſingle Judge. But there is no neceſſity for us to determine whether that caſe were rightly decided by the majority; for whether or not money received by a creditor, under the compulſion of proceſs, can or cannot be ſaid to be received by him in the uſual and ordinary courſe of trade and dealing; at leaſt, it muſt be received of the bankrupt to bring the caſe within the ſtatute; the payment muſt be made by the bankrupt, or if not by his individual hand, at leaſt by ſome agent of his, acting by his authority. But how can a payment extorted by compulſion of legal proceſs, from one who happened to have effects of the bankrupt in his hands at the time, be ſaid to be a payment by the bankrupt, who was not even conſcious of the fact? Therefore, without going more at large into the queſtion, it is ſufficient to diſpoſe of this caſe by ſaying, that it neither comes within the words nor the meaning of the ſtatute."

Lawrence, J. "This cannot be ſaid to be a payment by the bankrupt, even under the compulſion of proceſs; for the bankrupt could not even know that the money belonging to him was in the hands of the perſon at the time by whom the payment was in fact made."

Le Blanc, J. "This is very different from caſes of payments made by a perſon entruſted by the bankrupt with the diſpoſition of his property, or by his direction, which may be conſidered as payments made by him in the uſual and ordinary courſe of trade and dealing. But it is very difficult to ſay that a payment made by a third perſon, without the knowledge of the bankrupt, without his even knowing that his property was in the hand of ſuch third perſon, is a payment in the uſual ordinary courſe of trade and dealing by the bankrupt himſelf."

8. *In what Caſes an Action of* Aſſumpſit *will lie at the Suit of the Aſſignees for Money, or Goods received of a Bankrupt, either in Contemplation of, or after an Act of Bankruptcy.*

If money or goods be paid or delivered over by a bankrupt to a creditor, not in the ordinary courſe of trade, but in contemplation of, or after an act of bankruptcy, and with a view to favour that particular creditor, in preference to the other creditors, the aſſignees may recover back ſuch money, or goods, ſo paid or delivered.

Thus, in the caſe of *Linton*, aſſignee, *v. Bartlet*, (*b*) where a trader, in conſideration of a loan of 120*l.* without intereſt, being in inſolvent circumſtances, aſſigned one-third part of all his effects to the lender, who was his brother; and within two days after the making the deed, the trader abſconded, and a commiſſion was ſued out againſt him, whereupon he was declared a bankrupt.

Per Curiam. "Although this may be a hard caſe upon the brother, who is a *bonâ fide* creditor, yet the giving him the preference is a fraud upon all the laws concerning bankrupts, which proceed upon equality, and ſay that all the creditors ſhall come in *pari paſſu*. There is no caſe where ever ſuch a preference as this was allowed. The ſame ſpirit of equality ought to warm the courts of juſtice which warmed the legiſlature when they made the bankrupt laws; and if we ſhould let this deed ſtand, we ſhould tear up the whole bankrupt laws by the roots; it is a bill of ſale made by a trader, at a time when he was inſolvent, and (plainly) had an act of bankruptcy in contemplation; it is partial and un-

(*b*) 3 *Wilſ.* 47. *In this and ſome of the following caſes, the reader will obſerve that the form of action is* trover. *But as the aſſignees may elect to declare in* aſſumpſit, *or* trover, *for the ſame cauſe, where money has been actually paid, or goods ſold, &c. the caſes in both forms of action equally apply to the preſent ſubject. It ſhould, however, be obſerved, that in the caſe of goods delivered, if the aſſignees elect to bring* aſſumpſit *for goods ſold and delivered, inſtead of* trover, *they thereby affirm the contract, and the creditor may ſet off his debt againſt the demand of the aſſignees. See the caſe of* Smith *and others v.* Hudſon, 4 *Term Rep.* 211.

juſt to all the other creditors."—Judgment was therefore given for the plaintiff and the deed was declared to be void.

So, in the caſe of *Alderſon* and others, aſſignees, *v. Temple*, (*i*) which was alſo an action of *trover* for a promiſſory note, brought by the plaintiffs, as aſſignees of *Charles La Roche* and *Robert Willing*, bankrupts. The facts were theſe: The bankrupts *La Roche* and *Willing*, on *Friday* 7th of *November*, 1766, indorſed the note in queſtion to the defendant *Temple*, to whom they were indebted to a large amount; and ſent it in a letter directed to him at *Trowbridge*; which letter was carried to the poſt-houſe that morning, the bankrupts thinking that the poſt-day for *Trowbridge*. The letter, by the courſe of the poſt (which went out on the *Saturday* night) was received by the defendant ſome time on *Monday* the 10th, and could not be ſo before. The note in queſtion was,

"*London*, 10th *October*, 1766. Two months after date we pro-
"miſe to pay Meſſieurs *La Roche* and *Willing*, or order, ſix hun-
"dred pounds, for value received.

"*Bryer and Everard.*"

The bankrupts had given *Bryer* and *Everard* two notes for 300*l.* each; which had not been diſcharged. *La Roche* and *Willing* committed acts of bankruptcy on *Saturday* the 8th; and the ſaid note was ſo indorſed, and ſent to the defendant, in contemplation of their inſolvency and ſubſequent failure

The Court held, that the indorſing and ſending the note, under the circumſtances ſtated, were fraudulent as againſt the other creditors, and particularly Meſſrs. *Bryer* and *Everard*.

Lord *Mansfield*, Ch. J. ſaid, "It is material to obſerve a great deal that is not ſtated in this caſe. Firſt, there never was any courſe of dealing between the bankrupt and the defendants by way of indorſing, or ſending notes to each other. The next thing is, that the letter, in which the note was ſent, is ſuppreſſed by the defendant. It is not found, 'that the note was indorſed in payment of any debt;' it is only ſaid, 'he was a creditor to a larger amount.' It is not ſaid whether it was to be received at the riſque of *Temple*, or only as agent of the bankrupts; but the letter, which was in the power of the defendant, was not produced; and ſo the caſe

(*i*) 4 *Bur.* 2235. 1 *Bl. Rep.* 660. *S. C.*

ſtands

ſtands without any appropriation of the note. The caſe is ſilent in theſe particulars; and very materially ſo.

It is found that *Bryer* and *Everard* were creditors of the bankrupts to juſt the ſame amount, for two other notes they had taken in exchange; and that thoſe two notes were not diſcharged. The only queſtion I make is, whether, under the circumſtances of this caſe, the indorſing and ſending this note to the defendant is fraudulent and void, as ſuch? and I chooſe to put the caſe on that ground; becauſe the moſt deſirable object in all judicial determinations, eſpecially in mercantile ones, (which ought to be determined upon natural juſtice, and not upon the niceties of law,) is, to do ſubſtantial juſtice: and therefore I will avoid laying the ſtreſs that might properly be laid upon the aſſent being neceſſary to complete the contract, or the want of a delivery; the ſolid ground of which is, that a contract ſhall be preſumed complete upon any diſtinction where the juſtice of the caſe requires it, though there is no actual delivery. And it is ſettled that if a man ſends bills of exchange, or conſigns a cargo, and the perſon to whom he ſends them has paid the value before; though he did not know of the ſending them at that time, the ſending of them to the carrier will be ſufficient to prevent the aſſignees from taking theſe goods back, in caſe of an intervening act of bankruptcy. But if goods or bills of exchange are ſent, and the conſideration has not been received, the court of *Chancery* always interpoſes; and there are numbers of adjudged caſes of that kind in *Chancery*. In the caſe in *Strange*, (*k*) there is no doubt but the honeſty of the caſe inclined the court to the judgment they gave. The reaſon given turns upon a ſubtilty. The court of *Chancery*, in that caſe, would have interpoſed, and ſaid the aſſignees ſhould not have the goods without paying the price. I think the determination was right; and there was an actual delivery to a perſon who became a truſtee: but a poſt-boy is not a truſtee. I think the caſe was well ſupported upon other grounds than thoſe mentioned in the book.

I ground my opinion on this, whether the indorſement be fraudulent: and as to that, it is certain that the ſtatutes of bankruptcy leave a trader, to the moment of an act of bankruptcy committed, every power an owner can have over his eſtate. The ſtatute

(*k*) Atkins *v.* Barwick, 1 *Stra.* 165.

ſays,

ſays, fraudulent conveyances ſhall be an act of bankruptcy. Other acts that are fraudulent are not made acts of bankruptcy: but they are attended with the conſequences of fraud at law; which is, that fraud renders every act void.

All acts to defraud creditors, or the public laws of the land, are void: andif the nature of the act be a conveyance or grant, it is not only void, but an act of bankruptcy. It has been determined that a conveyance by a trader of all his effects, for the payment of one or more *bonâ fide* creditors of the moſt meritorious kind, though his effects do not amount to half what is due, is void; becauſe it is not an act in the ordinary courſe of buſineſs; it is not ſuch an act as a man could do, but it muſt be followed by an immediate act of bankruptcy; and it is defeating the equality that is introduced by the ſtatutes of bankruptcy; and the criminal (for the bankrupt is conſidered as a criminal,) is taking upon himſelf to prefer whom he pleaſes. But ſuppoſe he leaves out a conſiderable part of his effects: if it appears to be only colourable, that don't vary the caſe; it is fraudulent. Suppoſe a trader makes a conveyance of all his eſtate for the payment of all his creditors except one, (which was the caſe of *Gayner*, cited in *Dematto*'s caſe) (*l*) it is void. Suppoſe it was, to pay all his creditors rateably; if there were no aſſent of his creditors, or compoſition, it would be void, for it would be reſcinding the whole ſyſtem of the bankrupt laws, and inſtead of applying to the great ſeal, he would chooſe his own truſtees. If this is a fraudulent act, it is void.

A general queſtion has been ſtarted, Whether in any caſe, upon the eve of a bankruptcy, a man may do that which in conſequence prefers a particular creditor: and that has been argued as a general queſtion. But that will depend upon the act. As if a bankrupt, in courſe of payment, pays a creditor; this is a fair advantage, in the courſe of trade: or, if a creditor threatens legal diligence, and there is no colluſion; or begins to ſue a debtor; and he makes an aſſignment of part of his goods; it is a fair tranſaction, and what a man might do without having any bankruptcy in view. Suppoſe ſuch a caſe as *Small* and *Oudley*: (*m*) there it was for the advantage of the creditors, and no fraud to them; and if part of the tranſaction were ſet aſide as fraudulent, the whole muſt. But it never entered into the mind of any judge, to ſay,

(*l*) 1 *Bur.* 477. (*m*) 2 *P. Wms.* 427.

that

that a man in contemplation of an act of bankruptcy, could ſit down and diſpoſe of all his effects to the uſe of different creditors: for that would be a fraud upon the acts of bankruptcy. But if done in a courſe of trade, and not fraudulent, it may be ſupported.

This was not done in a courſe of trade: for there never was any dealing between the parties in ſending indorſed notes. There was no application made by the defendant. And it was done with a view to poſitive iniquity: for the bankrupts had received this note from *Bryer* and *Everard*, for notes of the ſame value; and knowing they ſhould become bankrupts the next day, to defeat *Bryer* and *Everard* of ſetting off their notes againſt it, indorſe this note to another perſon. And there was no way of doing juſtice to *Bryer* and *Everard*, but ſupporting the claim now made by the aſſignees. So that there was expreſs particular fraud at the time the fact was done. Next it is an act that is moſt certainly not complete as between the parties. The argument in the caſe of *Scott*, (*n*) is very applicable to the preſent. For there was a preference given to a *bonâ fide* creditor; but he knew nothing of it. Suppoſe in the courſe of trade, a bill is ſent to *Conſtantinople*, and a bankruptcy happens in *England* before it arrives; yet it may be good. But here it is done becauſe they were reſolved to commit an act of bankruptcy."

So, in the caſe of *Martin* and others, aſſignees of *Edward Robarts*, a bankrupt, v. *Thomas Pewtreſs*, and *Joſiah Robarts*, (*o*) which was an action of *trover* for goods to the amount of 19,562*l.* 17*s.* 8*d.* The facts were as follow: "The defendants were bankers, and large creditors of the bankrupt. *Edward Robarts*, the bankrupt, was the brother of the defendant, *Joſiah Robarts*. The value of the goods for which this action was brought, got into the hands of the defendants in the following manner: *Edward Robarts* bought goods upon credit from ſeveral tradeſmen who did not ſuſpect his circumſtances. The defendants employed agents to buy theſe goods from the bankrupt: particularly, one *Nathaniel Sweet*, who had been a bankrupt, and was then inſolvent, bought, between *March*, 1767, and *June*, 1768, (when *Ed-*

(*n*) 4 *Bur.* 2174. (*o*) *Ibid*, 2477. *See alſo* Ruſt *v.* Cooper, *Cowp.* 629. *S. P.*

ward

ward Robarts became bankrupt, to the amount of 7709*l.* at prime coſt: for which he gave his notes, payable at a future day. Theſe notes were paid into the defendants; and *Sweet* ſold the goods for the uſe of the defendants, and accounted with them for the profits, as their agent.

The defendants ſent another man, one *Moſes Birch*, to buy goods of the bankrupt to the amount of 2163*l.* 15*s.* 11*d.* prime coſt; and furniſhed him with bank notes to that amount to pay for them. He paid theſe notes to *Edward Robarts*, the bankrupt, who changed them at the bank for others, which he paid into the defendants. *Birch* ſold the goods for the uſe of the defendants, and paid them the produce; and in like manner as to all the reſt. The price, at prime coſt, was furniſhed in paper by the defendants to the agent; received by *Edward Robarts*, and returned to the defendants; or notes given by the agent, which notes *Edward Robarts* paid into the defendants and diſcounted with them: and the goods were all ſold, for the benefit of the defendants; and the money acccounted for to them, by the nominal and apparent purchaſers.

The court gave judgment for the plaintiffs on the ground of *fraud*.

Lord *Mansfield*, Ch. J. ſaid: "The fraudulent deſign and intention muſt depend upon circumſtances. In the preſent caſe it is as clear as the ſun, that the whole was a wicked ſcheme, concerted between the defendants and the bankrupt *Edward Robarts* to keep up his credit, to enable him to get goods which were to be employed to ſatisfy and diſcharge the debt due to the defendants. One of them is brother to the bankrupt. They muſt have known his inſolvency: for to their knowledge the goods were ſold at prime coſt. The bankers did not deal in ſuch goods. Had they bought them openly and in their own names, and applied the money to ſink the debt due to them, the neighbourhood would have been immediately alarmed. They knew that the perſons who ſold their goods upon credit to the bankrupt, would never be paid."

So, in the caſe of *Harman* and others, aſſignees of *Fordyce* v. *Fiſhar*, (*p*) where the facts ſtated for the opinion of the court of

(*p*) *Cowp.* 117. *Loft's Rep* 472. *S. C. See alſo* Hague *v.* Rolleſton, 4 *Bur.* 2174. Small *v.* Oudley, 2 *P. Wms.* 427. *S. P.*

King's

King's Bench were as follow: "The defendant was a creditor of the partnerſhip of *Fordyce* and Co. and on various occaſions had done them many acts of friendſhip, and being already a creditor for 1300*l.* upon the 6th of *June*, 1772, paid into the ſhop of *Fordyce* and Co. as bankers, the further ſum of 7000*l.* and had it written in his book, according to the uſual courſe; which ſum he had borrowed for the purpoſe of accommodating the ſhop during the holidays; and at the time the money was paid in, he ordered the perſon who paid it to tell them he ſhould not draw the money out before the *Friday* following, which they were told accordingly. On the 9th of *June*, *Fordyce* ſat up all night ſettling his books and affairs in contemplation of abſconding; and being poſſeſſed in his own ſeparate right of the two notes deſcribed in the declaration, about 5 o'clock in the morning, he incloſed them in a letter to Mr. *Fiſhar* as follows: "Mr. *Fordyce* conceiving that the money lodged by Mr. *Fiſhar* with his houſe on *Saturday* laſt, was a ſum, about which, perhaps, even ſome pains had been taken to place it there, he has the honour to ſhow him that preference which he conceives is certainly his due."

5,500*l.* *Collins* and Co. 3d *July*.

11,702*l.* 18*s.* 4*d.* *T. Wm. Jolly*, 20th *June*.

That *Fordyce* delivered the letter and notes to Mr. *Harriſon*, his clerk, with directions to carry them to Mr. *Fiſhar*'s office, and give them to him.—About ſix o'clock the ſame morning *Fordyce* abſconded and went to *France*. At half an hour after eleven o'clock the ſame morning a commiſſion of bankruptcy duly iſſued againſt him. *Harriſon*, about ten o'clock the ſame day called at the defendant's office; not finding him at home he returned again about twelve: but it being holiday time the office was ſhut up. That on *Thurſday*, the 11th, *Harriſon* delivered the letter with the notes to Mr. *James*, one of the partners of *Fordyce*, who ſent for the defendant; when Mr. *James*, in the preſence of the defendant and Mr. *Bellamy*, opened the ſaid letter, and delivered it with the notes to the defendant, who having read the ſame to the company preſent, took them away with him: that they remain in his poſſeſſion, and that he refuſed to deliver them up. That *Fordyce* was indebted to the partnerſhip in a larger ſum than the amount of the notes in queſtion.

The

The court determined that the notes were given to the defendant fraudulently, and in contemplation of an act of bankruptcy; and therefore judgment was given for the plaintiffs.

So, where a ſale of goods has been completed by actual delivery to the buyer, who afterwards becomes inſolvent before they are paid for, he cannot reſcind the contract, and return the goods, with the conſent of the ſeller, ſo as to give the ſeller a preference to his other creditors.

Thus, in the caſe of *Barnes* v. *Freeland*, (*q*) which was an action of *trover* brought by the plaintiff as aſſignee of *Lloyd*, a bankrupt, for 60 tons weight of iron; and at the trial the following admiſſions were made by the parties. On the 9th of *November*, 1792, the defendant agreed to ſell to the bankrupt 44 tons, 7cwt. 3qrs. 14lb. of iron at 15*l.* 15*s.* *per* ton, for the amount of which the bankrupt agreed to accept a bill of exchange at nine months date, to be drawn on him by the defendant; and the defendant, on the ſame day, delivered the iron to the bankrupt. The defendant, in purſuance of the agreement, on the ſame day drew a bill of exchange on the bankrupt for 699*l.* 4*s.* the amount of the purchaſe money payable at nine months after date, which the bankrupt then accepted, payable in *London*, and redelivered to the defendant, but it did not become due until after *Lloyd*'s bankruptcy, and it has been ſince proteſted for non-payment. The bankrupt tranſacted buſineſs with *Caldwell* and Co. of *Liverpool*, as his bankers, and on the 18th of *March*, 1793, was indebted to them in a conſiderable ſum of money; but the defendant was totally ignorant of the ſtate of their accounts. On the 18th of *March*, 1793, *Caldwell* and Co. ſtopped payment, of which the bankrupt heard in the morning of that day, and immediately went to the houſe of the defendant; and informed him that the bank of *Caldwell* and Co. had failed, and that he ſhould not be able to take up the bill which he had accepted, for the amount of the iron, meaning the bill before mentioned; for that in conſequence of *Caldwell* and Co.'s failure he (the bankrupt) muſt ſtop payment. On the ſame day he wrote to ſeveral of his creditors to the ſame effect, as to the neceſſity of his ſtopping payment; and the bankrupt informed the defendant that the before mentioned 44 tons, 7cwt. 3qrs. 14lb. of iron

(*q*) 6 *Term Rep.* 80.

had not been removed from the warehouſe wherein it was at the time of the ſale to the bankrupt, and ſaid he thought it would be an act of juſtice to return to the defendant the iron ſo bought, as he ſhould not be enabled to pay for the ſame, or to take up the accepted bill. The defendant accepted of the offer ſo made by the bankrupt, but ſaid he did not wiſh to have the iron, unleſs the tranſaction was fair and right; and at the ſame time the bankrupt delivered a bill of parcels to the defendant dated the 16th of that month of 50 tons of iron, including the iron ſo bought on the 9th of *November*, 1792, becauſe he at that time owed the defendant a further ſum of money on a bill accepted by the bankrupt for another parcel of iron bought by him from the defendant; and he therefore thought it his duty to give up the additional quantity beyond the 44 tons, 7cwt. 3qrs. 14lb. This bill of parcels was dated on the 16th of *March*, 1792, and was for 50 tons, at 15 guineas *per* ton, amounting to 787*l.* 10*s.* The bankrupt, in his account with the defendant, debited the defendant with the amount of this bill of parcels thus, "*March* 16th, to amount of 50 tons of iron, ſold him this day, 787*l.* 10*s.*" 44 tons, 7cwt. 3qrs. 14lb. part of the iron mentioned in this bill of parcels is the ſame which was ſold and delivered by the defendant to the bankrupt on the 9th of *November*, 1792; but the remainder was a parcel of iron which the bankrupt had received in exchange for other iron which the defendant and the bankrupt had ſome time before purchaſed in partnerſhip, which, upon a diviſion of ſuch joint purchaſe, had been allotted and delivered to the bankrupt, the bankrupt and the defendant having overpaid the ſellers of the laſt mentioned iron, bought on their joint account, they received the balance from the ſellers in a bill, which has been ſince the bankruptcy of *Lloyd* proteſted for non-payment, and taken up by the defendant; and this is the only unſettled tranſaction relative to that co-partnerſhip. No converſation paſſed between the bankrupt and the defendant on the 18th of *March*, relative to this co-partnerſhip tranſaction. On the 18th of *March* 1793, the bankrupt delivered the laſt mentioned bill of parcels, and alſo the key of the warehouſe wherein the whole of both parcels of iron was depoſited but not intermixed, to the defendant, who kept poſſeſſion thereof, but did not return to the bankrupt the bill of exchange for 699*l.* 4*s.* which was accepted by the bankrupt as aforeſaid, he the defendant having paid away the ſame in the uſual courſe of trade, and the ſame was not then in his the defendant's

fendant's poſſeſſion, but the defendant promiſed to take up and cancel the ſame, which he accordingly did. The defendant has, ſince the bankruptcy of *Lloyd*, ſold the whole of both parcels of iron on his own account, and received the purchaſe money for his own uſe. The defendant did not make any application to the bankrupt to redeliver or re-ſell to him the iron included in the laſt mentioned bill of parcels: but the ſame was a voluntary offer of the bankrupt wholly unſought by the defendant. This iron was all the ſtock in trade of the bankrupt in his actual poſſeſſion: but the defendant was not privy to this fact: and the bankrupt was indebted to the defendant in a further ſum of money, excluſive of the tranſaction before ſtated, viz. 200*l.* and upwards. The bankrupt, knowing himſelf to be inſolvent, was determined not to do any other buſineſs after the failure of *Caldwell* and Co. as before mentioned; and he, therefore, without the knowledge of the defendant, until the ſame was delivered to him, dated the bill of parcels the 16th of *March*, and entered it in his books under that date. The bankrupt did not tranſact any buſineſs after that date: on the 23d of *March* he committed an act of bankruptcy; a commiſſion of bankrupt iſſued againſt him on the 28th day of the ſame month; and the plaintiff is aſſignee of his eſtate, &c. The iron which the defendant ſold to the bankrupt on the 9th of *November*, 1792 is of the value of 665*l.* 9*s.* 1*d.* and the remainder of the iron included in the latter bill of parcels made by the bankrupt to the defendant on the 18th of *March*, 1793, is of the value of 59*l.* 13*s.* 5*d.*

The court were of opinion, that the buyer could not reſcind the contract, and return the goods to the ſeller, ſo as to give him a preference to his other creditors.

Lord *Kenyon*, Ch. J. ſaid: "The rules of law are framed with a view to benefit the bankrupt's creditors in general, and not to give a preference to any in particular. It is ſaid, however, that the vendor may in all caſes reſcind his contract with the conſent of the vendee at any time before the bankruptcy of the latter: but if that were ſo, all the creditors of a bankrupt, whoſe goods remained in his hands in ſpecie, might, when they found that he was in inſolvent circumſtances, go to the bankrupt's property, and bring away what each had contributed to the fund, leaving nothing to ſatisfy the reſt of the creditors. The preſent ſeems to be an extremely

tremely clear caſe, for it is founded in fraud. The parties themſelves endeavoured to give a different complexion to the tranſaction from that which is the true one, and in order to miſlead the creditors of the bankrupt, they made a falſe entry in the bankrupt's books; where it was ſtated that the re-delivery of the goods to the defendant was made two days before the time when the tranſaction really took place; and that fact is of great importance; becauſe that ante-date carries the re-delivery back to a time previous to the bankruptcy of *Caldwell* and Co. on which depended the ſolvency of the vendee. The goods here were originally ſold and delivered to the vendee, and they were locked up in his warehouſe; therefore there was a complete transfer of the property from the defendant to the bankrupt at the time; and the queſtion is, whether, when the latter became inſolvent he could re-deliver it back to the defendant in ſpecie. I cannot diſtinguiſh the preſent caſe from that of *Harman* v. *Fiſher* (*r*) on principle, for this bankrupt knew his inſolvent ſituation at the time when he wiſhed to deliver back the goods in queſtion to the defendant, as well as *Fordyce* did in that caſe; there *Fordyce*, finding that he was inſolvent, was anxious to repay to the defendant ſome bills which the latter had lent him, and though thoſe bills were as eaſily diſtinguiſhable from the the reſt of his effects as the iron in queſtion was from the reſt of this bankrupt's property, the Court there held that it could not be done, becauſe it would prejudice the other creditors of the bankrupt. Three caſes, however, have been cited, and preſſed upon us, as deciding the preſent: but I think they are to be diſtinguiſhed from this. In *Atkin* v. *Barwick*, (*s*) the vendees finding that their affairs were in a declining condition before the goods arrived at their houſe in *Cornwall*, refuſed to accept the goods, and thereby refuſed to become parties to the contract of ſale: and though when the goods did arrive by the waggon, the vendees could not turn them looſe in the ſtreet, yet they did what was tantamount to rejecting them, they ſent them to a friend of the conſignor for their uſe. In *Salte* v. *Field*, (*t*) conſider who was the party to the contract; not the clerk of the vendee who lived in *London*, but *Dewhurſt*, who was reſiding in *New York*; and he, knowing his inſolvent ſituation, ſent orders a month before the tranſaction in diſpute took place, to his clerk here, not to purchaſe any more

(*r*) *Ante*, 460. (*s*) 1 *Stra.* 165. (*t*) 5 *Term Rep.* 211.

goods for him; the clerk, immediately on the receipt of this order applied to the vendors to take the goods back again, who agreed to reſcind the contract. In giving my opinion on that caſe, I ſaid, that "the property in the goods was apparently diveſted out of the plaintiffs at the time of the ſale, according to the opinion which the parties then had of the tranſaction:" but though the property was then apparently diveſted out of the vendors, it was not ſo in reality, becauſe the delivery to the agent of the vendee was controuled by the prior orders of the bankrupt, his principal. But in this caſe the goods were delivered to, and accepted by the vendee, and the property remained in him until he became inſolvent. What was ſaid by Lord *Hardwicke*, in the caſe alluded to, does not apply to ſuch a caſe as the preſent: he only ſaid that, "before the contract was complete, and while the goods were *in tranſitu*, the owner might by any means, without committing a felony, regain the poſſeſſion of his goods for which he had not been paid. That, though ſaid in a court of equity, is now become a general and a good rule of law: but it muſt be confined to thoſe caſes where the goods are *in tranſitu*. Our decciſion therefore againſt the defendant in this caſe will be conformable to every decided caſe, and to the reaſon of the thing."

Aſhhurſt, J. ſaid: "It was admitted in the argument, that if the contract of ſale were not reſcinded at the time of the bankruptcy of the vendee, it could not be reſcinded afterwards by any act of the contracting parties; now I think that the contract here was not reſcinded before the inſolvency of the vendee. After the contract for the ſale of the iron, it was actually delivered to the vendeee, and put into his cellar, and he gave a bill of exchange for the payment of it; then the contract was complete, and could not be reſcinded by any ſubſequent act of the parties, ſo as to affect the intereſts of third perſons. But it has been ſaid that this iron was not mixed with the reſt of the bankrupt's ſtock: it is not neceſſary that it ſhould be mixed; but if it were, this iron was, to a certain degree mixed with the reſt of the ſtock, for there was ſome other iron in the ſame cellar. I do not rely, however, on that circumſtance, becauſe I think it immaterial; for if once the goods be fairly and completely delivered, whether they be or be not mixed with the reſt of the vendee's ſtock, the bankrupt and the vendor cannot

cannot reſcind the contract, if the rights of other perſons intervene, with a view of giving a preference to the vendor."

So, where the acceptor of a bill of exchange, two days before it became due, called upon the holder and informed him privately that he was inſolvent; the holder inſiſted on being paid the amount of the bill, whereupon the acceptor paid it, and four days afterwards became bankrupt: the bill was altered, (but without the defendant's knowledge,) ſo as to make it fall due before this tranſaction: this was held to be ſufficient proof of fraudulent preference.

Thus, in the caſe of *Singleton* and others, aſſignees of *Howell*, v. *Butler*, (*v*) which was an action of *aſſumpſit* for money had and received. At the trial before Lord *Eldon*, Ch. J. at *Guildhall*, at the ſittings after *Trinity* term, 40th Geo. 3. the following caſe was proved: The defendant having drawn a bill of exchange on *Howell*, the bankrupt, dated the 1ſt of *March*, 1796, payable to his own order three months after date, it was accepted by *Howell*, and indorſed by the defendant to his bankers. On the 2d of *June*, which was two days before the bill would become due, as it was originally drawn, *Howell* came to the defendant, and told him, that in conſequence of ſeveral houſes having failed, he had loſt large ſums of money, and his bills had been returned upon him, and he informed the defendant as his friend, (but informed no other perſon thereof) that his affairs were bad and would not pay above 10*s.* in the pound. Upon this the defendant ſaid that *Howell* muſt pay his bill, and that if he would, he, the defendant, would be ſecurity to *Howell*'s creditors for ſo much as the eſtate ſhould produce, if they agreed to a compoſition. *Howell* accordingly paid the bill, and on the 5th of *June* became bankrupt. It alſo appeared that the date of the bill had been altered from the 1ſt to the 21ſt of *March*, and that the time of payment had been altered from three months after date to two months after date. There was no evidence, however, to ſhow by whom this alteration was made, or that the defendant had any knowledge of it, but the circumſtances of the caſe rather afforded a preſumption that he did not. His lordſhip obſerved to the jury, that this was a bargain for a fraudulent preference, the conſideration of which was of no value; that the circumſtance of the bankrupt having called upon the defendant two days before the bill became due, and after diſcloſing his ſitua-

(*v*) 2 *Bos. & Pul.* 283.

tion, having acceded to the defendant's offer, afforded ſtrong ground for them to infer fraud, and that the inference of fraud, as far as related to the bankrupt, was rather ſtrengthened by the alteration which had taken place in the date and time of payment of the bill. The jury found a verdict for the plaintiffs for the amount of the money received by the defendant on the bill.

In the following term the counſel for the defendant moved for a new trial, and it was contended that the preference given to the defendant was not voluntary, inaſmuch as the defendant had inſiſted on having the bill paid, and that it was not neceſſary there ſhould be any threats of legal proceſs to rebut the preſumption of fraudulent preference. He cited *Smith* v. *Payne*,* where a ſecurity given to a creditor by a debtor at the mere inſtance of the former, but without any threats of an arreſt, was held valid, though the debtor himſelf informed the creditor of the bad ſituation of his affairs. Lord *Eldon*, Ch. J. having ſtated the caſe to the court with his directions thereupon, declared himſelf of the ſame opinion which he gave at the trial, and diſtinguiſhed this from the caſe of *Smith* v. *Payne*, becauſe there the creditor came to the debtor, and the ſecurity was taken for a debt actually due.

The reſt of the court concurring with his lordſhip, the rule for a new trial was refuſed.

But if a bankrupt make a payment to a creditor under the apprehenſion of legal proceſs, however groundleſs, ſuch preference is valid.

Thus, in the caſe of *Thompſon* and others, aſſignees of *Jane Wiſeman*, v. *Freeman*, (*u*) which was an action of *trover* tried before *Buller*, J. at the ſittings after *Hilary* term, 26 Geo. 3. at *Guildhall*, and was brought by the aſſignees of the bankrupt in order to recover ſome goods which the defendant had taken poſſeſſion of under a warrant of attorney to confeſs a judgment executed by the bankrupt about ſix months before the act of bankruptcy committed, but at a time when ſhe knew ſhe was in an inſolvent ſtate.

The defendant had, in the year 1780, joined in two bonds with the bankrupt, and had received a counter bond of indemnity.

* *Poſt* 470. (*u*) 1 *Term Rep.* 155. *See alſo* Hartſhorn *v.* Slodden, 2 *Bos. & Pul.* 582. *S. P.*

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When theſe bonds became due, the bankrupt, not having wherewithal to diſcharge them, applied again to the defendant, and engaged him to join with her in two new bonds, payable in *July*, 1784, for the purpoſe of raiſing money to take up one of the old bonds: one of them was accordingly taken up the 14th of *Jan.* 1784. The defendant took another counter-bond of indemnity upon his joining in the two laſt bonds. Previous to the 3d of *June*, 1785, the day on which the act of bankruptcy happened, the bankrupt ſent for the defendant, and propoſed to him that he ſhould take out his debt in goods, to which he acceded, and the warrant of attorney in queſtion was given. It appeared that her reaſon for ſending for the defendant originated from a letter, taking notice, though not in a threatening manner, of her ſituation with reſpect to the defendant, which letter ſhe had received juſt before from Meſſrs. *Foſſet* and *Bellamy*, whom ſhe knew to have acted, in a former tranſaction, as attornies for the defendant, though upon this occaſion they were not in fact concerned for him. The two laſt bonds were not diſcharged by the defendant till ſome time after the execution, nor had the obligees ever threatened to reſort to him for payment at that time, the bonds not having then become due.

Another circumſtance was alſo much relied on for the plaintiffs at the trial, that the defendant upon his examination before the commiſſioners had ſworn, that when he took poſſeſſion of the goods under the warrant of attorney, he was not an actual creditor.

The learned judge left it to the jury to conſider whether the means which the bankrupt put into the defendant's hands to pay himſelf were fraudulent or not; for if ſhe had executed the warrant of attorney from neceſſity, or in order to ſave herſelf, though, perhaps, acting by miſtake, or under a falſe apprehenſion that the defendant was taking due means to enforce his demands upon her, it was certainly a legal act; but if ſhe had acted merely with a view to favour the defendant, and give him an unjuſt preference, it was void. The jury found a verdict for the defendant. In the following term a motion was made for a new trial, which the Court refuſed; and Lord *Mansfield*, Ch. J. ſaid: "A bankrupt, when in contemplation of his bankruptcy, cannot by his voluntary act favour any one creditor; but if under fear of legal proceſs, he gives a preference, it is evidence that he

does not do it voluntarily. And though the defendant in this caſe had taken no ſteps to ſecure himſelf in caſe he was called upon, yet the bankrupt, acting from miſtake, was under the ſame apprehenſions of legal proceſs, as if the defendant had actually threatened her; ſo that her executing the warrant of attorney was not a voluntary act, but the effect of fear, however groundleſs that might be."

So, where a creditor, knowing his debtor to be in diſtreſſed circumſtances, and not able to pay his debt, applied to him, in the firſt inſtance, about two months before his bankruptcy, for a ſecurity, and took part of his ſtock in trade for that purpoſe: this is not an undue preference, though the creditor did not threaten to ſue in caſe of a refuſal.

Thus, in the caſe of *Smith* and another, aſſignees of *Hamilton*, v. *Payne*. (*w*) which was an action of *trover*; and the queſtion was, whether the defendant had not obtained them from the bankrupt, upon the eve of his bankruptcy by means of an undue preference given to him by the bankrupt. It appeared that about *April*, 1793, the bankrupt, who was a bookſeller, being indebted to the defendant in ſeveral ſums of money, amounting to about 385*l.* the latter happened accidentally to call upon him, when the bankrupt informed him that he was afraid of being arreſted, for that a perſon had been to demand 80*l.* which he owed, and was unable to pay: the defendant thereupon told him that he was fearful he (the bankrupt) was in a bad ſtate, as he had repeatedly told him in like circumſtances, but if he could get over the day, he ſhould do very well. The bankrupt expreſſing his fear of being arreſted, the defendant told him he would be ruined if he were, as he would not be able to get bail: the defendant, however, went immediately to a friend in the neighbourhood, and borrowed 80*l.* brought it back to the bankrupt, and deſired him to go and pay the debt directly. Shortly after this tranſaction the defendant applied to the bankrupt, and repreſented to him that he did not like to have the account unſettled, and ſo large a ſum due to him, and deſired to ſee what books he could have out of the ſhop in order to cover his demand; and admitted that he did not aſk for money, as he thought he could not get it. The bankrupt ſhowed him his catalogue; and

(*w*) 6 *Term Rep.* 152.

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he ſelected the books in queſtion at prime coſt, being ſuch as he thought the bankrupt could beſt ſpare, without impeding the carrying on of his buſineſs; of which books the defendant was immediately put in poſſeſſion. The defendant further admitted that he took the books to ſave himſelf, and that he would not have taken them, but that he was apprehenſive he could get no money, and therefore he had not aſked for any; that he had taken about 58*l.* in notes, having taken this tranſaction, and he admitted that he did not purchaſe the books in order to ſell them for profit, but to cover his debt, as he was apprehenſive of the bankrupt's circumſtances, having often heard him complain of them. The act of bankruptcy was committed on the 4th, and the commiſſion was ſued out on the 6th of *July*, 1793. The bankrupt himſelf was examined as a witneſs at the trial, and he ſwore that the tranſaction between him and the defendant was without fraud, and that he did not meditate any act of bankruptcy at the time. Lord *Kenyon*, Ch. J. at the trial, inclined to think that, upon the whole of the caſe, it appeared that the offer of the ſecurity was voluntary on the part of the bankrupt, and that the bad ſituation of his affairs was known to the defendant at the time the latter accepted of it; and therefore he recommended the jury to find a verdict for the plaintiffs; they, however, found for the defendant.

The counſel for the plaintiff moved for a rule to ſhow cauſe why the verdict ſhould not be ſet aſide. But the Court were of opinion that there was no undue preference in this caſe, and therefore refuſed the rule.

Lord *Kenyon*, Ch. J. ſaid: "I confeſs that the impreſſion which I received at the trial was unfavourable to the defendant: but the jury thought differently; and I ſee no reaſon, upon maturer conſideration, to differ from the concluſion they have drawn. I think I laid too much ſtreſs upon the admiſſion made by the defendant, that at the time he applied to the bankrupt he did not aſk for money becauſe he thought he could not get it; for in truth, the ſame obſervation may apply in many inſtances to creditors taking ſecurity inſtead of actual payment, for their debts.

This alſo ſhows that this was not a voluntary offer on the part of the bankrupt, but that the ſecurity was given in conſequence of his being urged by the defendant for that purpoſe, who was not diſpoſed to truſt him any longer. It is admitted that if the defendant had threatened the bankrupt in caſe of his refuſal, the tranſaction would have been valid; but there is no occaſion for a creditor under ſuch circumſtances to threaten an actual arreſt; and here the defendant did preſs the bankrupt for a ſecurity. And under theſe circumſtances the bankrupt himſelf having ſworn to the honeſty of the tranſaction, and that he did not meditate a bankruptcy at the time, and the jury by their verdict having negatived the idea of collusion, there is no ground for ſetting aſide the verdict."

If goods are conſigned by a bankrupt (previous to his bankruptcy) to a factor who is fully acquainted with his inſolvency; and upon ſuch conſignment money is advanced by the factor; this is not a fraudulent conſignment; and the factor is entitled (as againſt the aſſignees) to retain the produce of the goods in ſatisfaction of the general balance due to him from the bankrupt.

Thus, in the caſe of *Foxcroft* and others, aſſignees of *William Satterthwaite*, a bankrupt, v. *Devonſhire* and others, (*x*) which was action of *aſſumpſit* for money had and received to the uſe of the plaintiffs as aſſignees. The facts of this caſe being fully ſtated in the judgment of the court, as pronounced by Lord *Mansfield*, Ch. J. it will be unneceſſary to ſtate any thing more than what he ſaid on this occaſion, which was as follows: "This matter came before the court, upon a motion for a new trial, on the ground of a miſdirection by the judge who tried the cauſe. It was admitted at the trial, that *Satterthwaite*, the bankrupt, was a trader: and the debt of the petitioning creditor, the commiſſion, and the aſſignment, were likewiſe all admitted. The action was brought for monies ariſing from the ſale of goods that had been conſigned by the bankrupt to the defendants as factors for him, and ſold by them as ſuch; which money was admitted to be in the defendant's hands, and amounted

(*x*) 2 *Bur.* 931. 1 *Bl. Rep.* 193. *S. C.*

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to 5314*l.* 17*s.* 9½*d.* It appeared that the defendants had paid ſeveral ſums of money, to *Satterthwaite*'s uſe, upon bills drawn upon them by him, and otherwiſe. The plaintiffs (the aſſignees under the commiſſion) proved ſome ſecret acts of bankruptcy to have been committed by *Satterthwaite* about *Chriſtmas*, 1751; namely, his being denied to his creditors. On the other ſide it was proved, that he ſoon appeared again publickly as uſual; and continued to do ſo till about the month of *Auguſt* following (1752), but in that month, he ſtopped payment: and thereupon the commiſſion was taken out. Theſe ſecret acts of bankruptcy, committed at *Chriſtmas*, 1751, over-reached the conſignment of the goods, the ſale of them, the receipt of the monies for which they were ſold, and likewiſe the time when the defendants advanced the monies to the uſe and order of the bankrupt.

It was inſiſted by the counſel for the defendants, from the nature of the preſent action, the defendants, being factors, ought to be allowed not only for their commiſſion, and all charges and expences, but alſo whatever money they had paid on account of bills drawn upon them by *Satterthwaite*; and that the plaintiffs in this action could only recover the balance of the general account.

The counſel for the plaintiffs admitted that the defendants were entitled to be allowed their commiſſion, and all charges and expences as factors; but not the bills of exchange drawn by *Satterthwaite*, which they had paid ſubſequent to the act of bankruptcy.

This queſtion was agreed to be reſerved, (if it ſhould be neceſſary to have recourſe to it,) as a point for the future conſideration and determination of the judge who tried the cauſe. But the counſel for the plaintiffs inſiſted on a preliminary point; viz. that the defendants were guilty of a fraud, in paying theſe bills of exchange, drawn upon them by the bankrupt: which preliminary point of fraud was ſufficient to deſtroy any right that the defendants might otherwiſe claim (ſuppoſing the tranſaction had not been fraudulent,) to an allowance of the money paid in diſcharge of them; and conſequently to preclude them from entering at all into the queſtion above-mentioned. For if it ſhould be admitted

mitted on the part of the plaintiffs, that this action of *aſſumpſit* affirmed the contract, yet if their payment of the bills was fraudulent, it would at once put an end to their claim of an allowance of the money as fraudulently paid. They granted that in caſe the defendants ſhould appear not to have been guilty of any fraud, but to have paid the bills fairly and honeſtly, they would then have a right to enter into the point reſerved (as above) for future conſideration: but they inſiſted that upon ſuppoſition, that in a common caſe, this ſort of action would confirm the contract, ſo as to make the conſignment, ſale, and payment of the bills to be conſidered as before any act of bankruptcy committed; and conſequently, that the defendants would be entitled to retain what they had paid upon the bills; (for every thing that could be alledged by the defendants muſt, *pro hac vice*, be admitted upon a previous bar to their going into the queſtion;) yet the bar of fraud would deſtroy any demand they could have upon that account. And the fraud which they charged upon the defendants was this, "that they were privy to *Satterthwaite*'s inſolvency, at the time when they advanced the monies, to diſcharge his bills."

Upon this preliminary point only of fraud, it was left to the jury: and upon this point only, they found their verdict. Upon hearing all the evidence, they were of opinion that the tranſaction was fraudulent on the part of the defendants; and they gave a verdict for the plaintiffs for the whole money; deducting only the commiſſion due to the defendant, and the expences of the ſale of the goods.

Though the ground of the verdict ſhould be wrong, yet, if it clearly appeared to us now, that upon the whole no injuſtice had been done to the defendants; or if it clearly appeared to us now that the plaintiffs, by another form of action could recover all they have got by this verdict, we think the Court ought not to grant a new trial. But if injuſtice be done to the defendants by the preſent verdict, and if it be not certain and clear that the plaintiffs might have equal redreſs, and recover as much, by another form of action; then we ought to grant a new trial.

Two points have been argued and urged on the part of the plaintiffs.

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1ſt, That clearly the defendants were not to be allowed to retain for the bills: becauſe, 1ſt, They were not paid till after an act of bankruptcy; 2dly, this action of *aſſumpſit*, only admits the ſale of the goods, and nothing elſe but the agency of the defendants in that ſingle reſpect; and 3dly, if it admitted every thing ſo as to put the aſſignees in the very condition the bankrupt would have been, had he brought this action, yet a factor has no lien for items of a general account (his lien being confined to his commiſſion and expences about the particular goods.

Theſe points have not been at all conſidered in this action: and therefore it is enough if they are doubtful. They went off, upon the preliminary queſtion of the fraud being taken up and purſued, and were never afterwards taken into any further conſideration at the trial.

We are not clear that this action of *aſſumpſit* does not affirm the power of the bankrupt and the contract, throughout the whole tranſaction. Where ſuch an action is brought by aſſignees of a bankrupt's effects againſt a vendee of goods, it affirms the ſale, and alſo the payment to the bankrupt of any part of the price. It is agreed here, that it admits the conſequence of the defendants being factors; and allows a lien for commiſſion and expences.

That a factor has alſo a lien upon goods conſigned, whilſt they remain in his poſſeſſion, for items of a general account with his principal, has been ſolemnly determined. However, the preſent caſe differs from the caſe of *Kruger* v. *Wilcocks*,* where it was ſo determined. For there the factor remained in poſſeſſion of the goods: but here the goods have been ſold, and turned into money. In ſuch a caſe there never was a doubt but that mutual items of account might be ſet off: the demand and recovery can only be for the balance. Therefore it is impoſſible to ſay, that the queſtion the defendants would have made upon this point, had they been permitted, may not be very material. And if it might have been material to their defence, they have a right to have it tried and conſidered.

2dly, Another matter gone into at the trial, and urged by the counſel for the plaintiffs, was, that in an action of *trover*, the plaintiffs might certainly recover the value of the goods, without making any allowance.

* *Ante*, 1 *Vol.* 267.

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This would depend on a variety of circumſtances, which were not gone into at the trial becauſe the counſel for the defendants were ſtopped and cut ſhort by the preliminary bar of the fraud, which was alone ſufficient to invalidate their claims as upon a fair tranſaction. This makes it neceſſary to examine the ground of the verdict, which proceeded from the direction given. I will admit "that the evidence proved the fact, and every concluſion deducible from it:" but I cannot think that the fact ſo proved, or concluſion ſo drawn, amounts to that offence which the law calls fraud, to avoid the debt. And in examining this matter, we muſt remember, that, *pro hac vice*, the whole tranſaction is admitted to be before any act of bankruptcy. Fraud often is a mere fact; as when it depends (as on a policy of inſurance, for inſtance,) upon what the party ſaid or did: or it may be, and often is a queſtion of law. Suppoſe a creditor, knowing a trader likely to break, conceals it from the knowledge of other creditors, till he gets, even by threats of legal proceſs, payment of his debt before any direct act of bankruptcy; and the aſſignees ſhould inſiſt this was a fraud, and that he ſhould refund: this is a matter of law; and the law would ſay, that this was not fraudulent. Suppoſe a man *bonâ fide*, lends money to a trader upon a mortgage, after an act of bankruptcy without notice; and then knowing of the commiſſion of bankrupt and aſſignment, gets in an old term, even for little or no conſideration; and the aſſignees bring an ejectment; and it becomes a queſtion whether this be a fraud, or not; this is a matter of law; and the law will ſay, it is no fraud; for the mortgagee had a right to do this.

The evidence of fraud in this caſe, as ſtated by the report, are the following letters. The firſt is dated, *Briſtol*, 5th *May* 1752, ſigned "*Devonſhire* and *Reeves*," and directed to "*William Satterthwaite*" "We wiſh you had been open, and told us in time how your affairs ſtood—it appears to us very evidently, you have riſqued your reputation and credit on the faith of thoſe S. Do but conſider where you muſt have been in point of reputation, had we done otherwiſe than we did.—It is now over; and we will not do any thing that ſhould leſſen your credit. Therefore ſhip not an ounce of goods more till your affairs are ſettled."

The next letter is dated *Briſtol*, 15th *May*, 1752, ſigned "*Devonſhire* and *Reeves*," and directed to *William Satterthwaite*, merchant

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in *Briſtol*; and contains the following paſſage: "We cannot help being uneaſy to think you have drawn on us again for 120*l.* Really you will make us let your bills go back proteſted, in ſpight of our inclinations. We will pay this; but take notice, don't draw another: we friendly hint it."

The next letter is dated 25th *June*, 1752, ſigned and directed above; and is thus: "*William Satterthwaite*, eſteemed friend—We really fear theſe proceedings will greatly hurt your credit in the eyes of every judicious perſon: it is very natural to think that will be the conſequence. For our part, we would make a thouſand ſhifts, rather than triſle with our reputation, as you do with yours.—It's a matter well worth your ſerious conſideration."

"P. S. Incloſed we return you *Liebenrood*'s draft, 150*l.* which with one ſhilling poſtage, place to our credit. This is ſuch a thing we never did before, nor ever will again."

The next letter is dated 27th *June*, 1752, ſigned as before, and directed to *William Satterthwaite*. After referring to the laſt, it goes on thus.—"In this laſt letter, thee mentioneſt nothing of remitting for *Liebenrood*'s bill, which thee ordered us to ſend for from *London* four days before due, (which we did, and returned thee in our laſt,) though thee promiſed us faithfully to remit for the ſame, laſt 6th day was a week: and having had ſundry letters that take no notice thereabout, we cannot help thinking and ſaying that thee triſles with thy creditors and us. We are ſo much in want of money as thee canſt poſſibly be; and had we thought thee wouldeſt have treated us in this manner, we would not have advanced one quarter of the ſum, to be allowed 10*l. per cent.* The diſappointment to us gives more uneaſineſs than all the profits of a year's trade will do us."

The next letter is dated 14th *July*, ſame year, and ſigned as before, *William Satterthwaite*, and is as follows: "Eſteemed friend, ſo much for your affairs, in and under our care; which ſhall be managed with all care and frugality. But what next we ſay appears to us in a very odd light: for *Edward Wilcox* has been with us, and ſays you have made over our goods on the *Sarah* and *Martha*. If true, gives us ſuch ideas that we dare not put pen to paper to ſay our ſentiments. If you ſend us any more bills—if ever we do return a bill we will return yours."

The next letter is the 28th *July*, the ſame year, ſigned as before: and is as follows.—"*William Satterthwaite*, the *Sarah* and *Martha*, your 3-8ths. The *Carolina*, how much? tell us: for you

you muſt ſecure us, by a bill of ſale of each, that is your parts.—Unleſs you ſend here, ſome ſecurity.—Say your father, *Moſs*—join in a bond, or ſome good man. *Claimants* will be made upon us, for their proportions of cargoes we have ſold; as *Touchetts* did of the rice. We are willing to ſtand by you as far as we can with prudence: but an undoubted counter ſecurity we muſt have—We dread the conſequences of theſe repeated ſtrokes, we very much ſuſpect you have not the money—We muſt have your affairs cleared up—Whatever you are, we are almoſt broken-hearted to ſee how you are going on, and have of late. And what will be the conſequence, if you are worth 3000*l.*? we know and have ſeen the conſequence elſewhere."

Some vague ſuſpicions beſide, have been mentioned at the bar, by the counſel for the plaintiffs: as, that they were all of them quakers, and endeavouring to play into each other's hands, to the prejudice of *Satterthwaite*'s other creditors; that *Satterthwaite* had broke before; that all the bills were after *May*; (which the other ſide deny.)

But as I proceed upon allowing the evidence to prove the concluſions contended for, it is only neceſſary to examine what thoſe concluſions are. The report ſays that a falſe credit was given the bankrupt: *i. e.* he would have broke openly unleſs they had lent him money. The counſel for the plaintiffs ſay, the defendants lent him money to keep him from failing, till his ſhips and goods might come home, conſigned to themſelves, or even to the bankrupt's own hands: whereas if a commiſſion had iſſued before that time, the aſſignees would have had them.

It was left to the jury, that if they believed from the evidence, that the defendants knew or underſtood the bankrupt's circumſtances to be inſolvent at the time they paid his bills; they might find againſt them, upon the ground of fraud. And they found in the affirmative.

Had the queſtion turned upon the validity of a payment made after an act of bankruptcy committed within the act of 19 *Geo.* 2. *c.* 32. (which was one of the points made at the trial,) the direction would have been quite agreeable to the terms of that act. But, as the queſtion was, whether, ſuppoſing the whole tranſaction before any act of bankruptcy committed, the defendants were to be excluded from claiming ſatisfaction for the money they had advanced upon *Satterthwaite*'s bills, by reaſon of their fraud

fraud in advancing it.—"We are all of opinion that the direction was a miſtake."

It is no fraud, for a factor, knowing the circumſtances of his principal to be deſperate, and believing he muſt break unleſs he can procure credit, to advance money upon his bills, to ſave him from an immediate failure. On the contrary, it is an honorable, friendly, and generous act. No prejudice can ariſe, but to the lender himſelf. He may loſe the whole or the greateſt part of the money ſo advanced: but the principal's eſtate, if he breaks, is by ſo much a gainer; or ſome particular creditors to whom this money has been paid, are gainers. If by this aſſiſtance, the principal has the good luck to ſtand his ground, he and all his creditors are benefited: but none of his creditors can ſuffer by the advancement of money to their debtor. Many beneficial inſtances of this kind have ſaved the moſt conſiderable houſes from ruin. If the factor truſts that effects of his principals will come over from abroad conſigned to him, by which means he may acquire a lien upon them for his reimburſement, the factor's conduct is a little more prudent; but ſtill it is free from all colour of fraud. It is the uſual method of dealing between principals and factors in good credit; the latter advance money upon the faith of conſignments: but when a factor, knowing his principal to be in great diſtreſs, and in immediate danger of failing, advances money upon the faith that effects beyond ſea will come over conſigned to him, he acts meritoriouſly. The richeſt man in trade may be ruined, while his effects are abroad, and not in his own power, to anſwer immediate demands upon him, (which was the caſe of the *Woodwards*, who could not ſave themſelves from failing; though they had ſufficient to pay 30*s.* in the pound). But the factor may actually ſave him by this aſſiſtance, till they come home: and yet the factor himſelf runs a great riſque, and truſts to a precarious ſecurity. For the goods may in fact be conſigned originally to another; or the conſignment to him may be countermanded, they may be ſold; they may be mortgaged, or burnt, or loſt, and never come into his poſſeſſion ſo as to give him any lien: and it appears by the letters that have been read, that in this very caſe, *Satterthwaite* unworthily made over to other perſons part of the goods to which the defendants had truſted for their ſecurity.

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A mortgage of ſhips abroad, or of cargoes upon the high ſeas, by a trader, to any body is good, notwithſtanding the clauſe in 21 *Jac.* 1. c. 19. though poſſeſſion has not been actually delivered: for a bill of ſale is all the poſſeſſion that can be delivered, till the ſhip comes home.

There ſcarce happens a bankruptcy in which it does not appear that a fictitious credit has been acquired by drawing and redrawing bills of exhange, and by accepting and indorſing promiſſory notes: yet there never was a doubt, but that the perſons lending their names, by which they render themſelves at laſt liable, may come in as creditors. The caſe of a man who has actually paid his money to ſupport the credit of another, is infinitely ſtronger than that of lending a name only, without advancing any money at all. There cannot be a greater paradox than that a man ſhould be guilty of a fraud in lending his money with no other proſpect but the chance of being repaid it. A notion that lending money to traders, knowing them to be in dubious, tottering, or diſtreſſed circumſtances, upon mortgages or liens, is fraudulent, and, conſequently the contract void in caſe a bankruptcy enſues, would throw all mercantile dealing into an inextricable confuſion. Men lend their money to traders upon mortgages or conſignment of goods; becauſe they ſuſpect their circumſtances, and will not run the riſque of their general credit. Upon the whole of this caſe we are of opinion that there muſt be a new trial."

Where goods are ſold, or money is paid by a bankrupt after an act of bankruptcy, the aſſignees may maintain an action of *aſſumpſit* or *trover* for the amount thereof.

Thus, in the caſe of *Huſſey* v. *Fiddall*, (*y*) which was an action of *aſſumpſit*, brought by the aſſignee of a bankrupt for goods ſold and delivered by the bankrupt after an act of bankruptcy.—It was objected that the action ſhould have been *trover* and not *aſſumpſit*, becauſe *trover* might be brought for the ſame cauſe again. But *Holt*, Ch. J. ſaid: "the aſſignees may avoid the ſale if they will,

(*y*) 12 *Mod.* 324, & *vide* Cooper *v.* Chitty, 1 *Bur.* 20. 1 *Bl. Rep.* 65. *S.C. and* Hitchen *v.* Campbell, 3 *Wilſ.* 304. 2 *Bl. Rep.* 827. *S.C.*

and

and bring *trover* for the goods; but if they bring the one, they ſhall not after bring the other. By act of bankruptcy the property of the goods is in the bankrupt's creditors; and if it be a *choſe in action* that is aſſigned, the aſſignee is to have the ſame remedy for it as the bankrupt himſelf might have had; as if it be money received to the uſe of bankrupt, they are to have ſuch remedy as he might have had for it; and without doubt the action well lies here, and even a general *indebitatus aſſumpſit* would have done."

So, in the caſe of *King*, aſſignee of *Langman* v. *Leith*, (z) which was an action of *aſſumpſit* for money had and received to the uſe of the plaintiff as aſſignee. The facts of the caſe were theſe: *Langman* the bankrupt was arreſted, on the 19th of *January* laſt at the ſuit of the plaintiff, and he became a bankrupt by lying two months in priſon, which expired on the 26th of *March*. On the 19th of *February* the plaintiff's attorney gave notice by a letter to the defendant, (who had been employed by *Langman* about the latter end of *January* as a broker to ſell his effects) not to ſell them, becauſe *Langman* had committed an act of bankruptcy, that a commiſſion of bankrupt would ſhortly be iſſued againſt him, and that the act of bankruptcy would relate to the day when it was committed, which was ſome time paſt. The defendant in his anſwer to this, dated 23d of *February*, ſaid, that as he had advertiſed the ſale, and begun to ſell, and the goods would not produce the ſum for which *Langman* was in priſon, he had thought it better to complete the ſale; and that he had ſold the effects without any deſign to defraud. On the firſt of *March* the defendant paid *Langman* 120*l.* being the produce of the ſale. The defendant's counſel objected, firſt, to the form of the action, and that it ſhould have been *trover*; and ſecondly, that the ſale and payment were good, being before the act of bankruptcy was complete.

But the court over-ruled theſe objections and gave judgment for the plaintiff.

Aſhhurſt, J. ſaid: "Whatever doubt may have been formerly entertained upon this queſtion, it is now clear that the aſſignees of the bankrupt have an election to bring either *trover* or *aſſumpſit* in a caſe like the preſent. The only diſtinction attempted to be

(z) 2 *Term. Rep.* 141.

taken between this and other acts of bankruptcy is, that all the other acts of bankruptcy are complete in themſelves, whereas this is a complicated matter, and is inchoate till the party has lain in priſon two months; and therefore the act of bankruptcy is not complete till the expiration of that time. But I do not think that makes any difference; for as ſoon as the two months are expired, it relates back to the time of the firſt arreſt, and then operates as if the arreſt were a complete act of bankruptcy in itſelf. Then if the act of bankruptcy over-reach all intermediate acts ſo as to veſt the property in the aſſignees from the time of the act committed, it follows as a neceſſary conſequence that they may either affirm or diſaffirm the act of any party who, after the act of bankruptcy, has converted the trader's effects into money, either by bringing an action for money *had and received* to their uſe, or by bringing *trover*; and here they have choſen the former. The ſtatute of George the Second makes no difference; that only provides that no payment ſhall be ſet aſide which is *bonâ fide* made to the bankrupt in the common courſe of trade: but this cannot be ſaid to be a payment really and *bonâ fide* made in the common courſe of trade, becauſe the defendant had expreſs notice of the bankrupt's ſituation. And though, ſtrictly ſpeaking, at the time of the notice the act of bankruptcy was not complete, yet after that notice the defendant was not warranted in paying the money over to the bankrupt, and it cannot be called a *bonâ fide* payment."

Buller, J. "With regard to the ſecond point: whether this be conſidered on the conſtruction of the bankrupts laws, or on the caſes adjudged, I have not the ſmalleſt doubt but that the bankruptcy relates to the day on which the bankrupt was arreſted; and the court are bound to conſider it ſo, and reaſon upon it as ſuch. The other objection as to the form of the action ſeems to have been decided by the caſe of *Hitchin* v. *Campbell*, (*a*) which ſays, that the aſſignees have their election to bring either *trover* or *aſſumpſit*. But without entering into the caſes upon that ſubject, I ſhould be diſpoſed to ſupport the latter. For that is moſt beneficial to the defendant; becauſe in *trover* the plaintiff may recover the the full value of the goods though the ſale may not actually have produced more than half their worth; but in *aſſumpſit* the aſſignees are only entitled to recover what the party really received, which

(*a*) Ante 480. n. y.

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is only what the ſale of the goods produced. But even ſuppoſing there had not been any other caſe upon this ſubject, there could be no doubt in this caſe; for the letter written by the defendant in anſwer to one from the plaintiff's attorney is deciſive that this action will lie. For, firſt, he had notice that the bankrupt was in inſolvent circumſtances, that he was in gaol, and that the goods did not come into his poſſeſſion till after the arreſt; to which he returned for anſwer that as he had advertiſed and begun the ſale, and the goods would not produce the ſum for which the bankrupt was in priſon, he had thought it better to complete the ſale, and that he had ſold the effects without any deſign to defraud. Now this is as much as if he had ſaid, that it was moſt beneficial for him that the goods ſhould be ſold, but that he would hold the money for thoſe who are really entitled to it."

So, in the caſe of *Smith* and another aſſignees of *R. Drake* and *Ebenezer Goddard* v. *William Goddard*, (*b*) which was an action of *aſſumpſit*. The firſt count of the declaration ſtated, that the defendant, before *R. Drake* and *E. Goddard* became bankrupts, was indebted to the ſaid *R. D.* and *E. G.* for money had and received to their uſe, and being ſo indebted, promiſed to pay, &c. The ſecond count ſtated, that after the bankruptcy of *R. D.* and *E. G.* the defendant was indebted to the plaintiffs, as aſſignees, for money had and received to their uſe as ſuch aſſignees, and being ſo indebted promiſed to pay, &c. There was alſo a third count, on an account ſtated between the plaintiffs, as aſſignees, and the defendant. The defendant pleaded *non aſſumpſit*, and gave a notice of ſet-off. At the trial before Lord *Alvanley*, Ch. J. it appeared that *R. Drake* and *E. Goddard* carried on buſineſs in partnerſhip; that *E. G.* committed an act of bankruptcy, on the 8th of *February*, 1802, and *R. D.* on the 17th of the ſame month in the ſame year; that a few days previous to the firſt act of bankruptcy, a large ſum of money was paid into the houſe on account of the defendant; that between the 8th and 17th of *February* ſeveral ſums of money amounting to 558*l.* were paid to the defendant by a clerk of the houſe in conſequence of the former inſiſting on ſuch payment, there being evidence to ſhow that he was acquainted with the inſolvent ſituation of that houſe; that on the 28th of *February* 5*l.* more were paid to the defendant;

(*b*) 3 *Bos. & Pul.* 465.

that up to the 17th when *R. D.* became bankrupt, the balance of accounts between the partnerſhip and the defendant continued to be in favour of the latter, and that the trade continued to be carried on by the bankrupts till the 15th of *March*. The plaintiffs were aſſignees under a joint commiſſion againſt *R. Drake* and *E. Goddard*.

The counſel for the defendant made two objections; firſt, that neither of the counts in the declaration was ſo framed as to entitle the plaintiffs to recover, becauſe the money being paid to the defendant after the act of bankruptcy committed by *E. Goddard*, but previous to that committed by *R. Drake*, the defendant was not indebted to the partners before their bankruptcy, as alledged in the firſt count, nor to the aſſignees after the bankruptcy of both, as alledged in the ſecond count, for *R. Drake* being ſolvent when the money was paid to the defendant, it was money received by the defendant to the uſe of the plaintiffs, as aſſignees of *E. Goddard* and to the uſe of *R. Drake*. Secondly, that as the balance, when *R. Drake* became bankrupt was in favour of the defendant, the aſſignees could not recover on any demand prior to *R. Drake*'s bankruptcy, ſince the 5 Geo. 2. c. 30. ſ. 28. directs the aſſignees to ſtrike a balance when there have been mutual debts or credits, and that balance muſt be taken at the time when both partners become bankrupts, and that at all events therefore, the defendant muſt be allowed the money received by the bankrupts on his account, before the bankruptcy of either.

The court determined that the declaration did not embrace the whole cauſe of action; and that the plaintiffs could only recover the ſum of five pounds thereon.

Lord *Alvanley* Ch. J. delivered the opinion of the court as follows: "This is an action for money had and received, brought by the plaintiffs as aſſignees of two perſons in partnerſhip, and the money in diſpute was paid by the perſon who acted as clerk in the partnerſhip concerns after an act of bankruptcy committed by one of the perſons, but before an act of bankruptcy committed by the other. With reſpect to the 5*l.* paid after the bankruptcy of both, the plaintiffs are clearly entitled to a verdict for that ſum; and the only queſtion we have to decide is, whether the aſſignees can recover the money in diſpute under a count for money had and received to the uſe of the plaintiffs, as aſſignees of both parties? We are of opinion, that in this caſe it is not poſſible to contend

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with ſucceſs, that the plaintiffs ought to recover in the way in which they have declared. No doubt the plaintiffs are joint aſſignees of both the partners, and as ſuch they might have ſued for money had and received to the uſe of each; and if there had been a count for money had and received to the uſe of the plaintiffs as aſſignees of the partner who had committed an act of bankruptcy at the time the money was paid, they might perhaps have recovered one moiety. On this, however, we do not mean to give an opinion. It is clear that after the bankruptcy of *Goddard*, the clerk was the agent of ſuch perſons as ſhould be choſen aſſignees of his eſtate, as well as of *Drake*, who was then abſent. But we think that upon the preſent declaration there is no pretence for ſaying that the plaintiffs ought to recover."

So, in the caſe of *Vernon* and others aſſignees of *Elizabeth Tyler*, a bankrupt, v. *Hankey* and others, (*c*) it was held that bankers are liable for money paid upon the drafts of a bankrupt out of caſh in their hands belonging to the bankrupt, after notice of an act of bankruptcy committed by him.

But where the aſſignees of a bankrupt have recovered (by a judgment) from the bankers, the money which they had ſo wrongfully paid over, they cannot recover the ſame ſum from the creditor, though he received it after notice of the bankruptcy; the aſſignees having refuſed to permit the bankers to ſet off this payment in the action brought againſt them.

Thus, in the caſe of *Vernon* and others aſſignees of *Elizabeth Tyler* a bankrupt, v. *Hanſon*, (*d*) which was alſo an action of *aſſumpſit* for money had and received. The facts were theſe: The defendant had received 1090*l.* being the amount of a draft drawn in his favour for a *bonâ fide* debt by the bankrupt on Meſſrs. *Hankeys*, her bankers, which money was received by the defendant after notice of the bankruptcy. In the caſe above referred to, the plaintiffs had recovered a large ſum againſt the *Hankeys* for money belonging to the bankrupt received by them, in which action they attempted to ſet off this as well as ſeveral other ſums which they had paid on the bankrupt's account: but

(*c*) 2 *Term Rep.* 113. (*d*) 2 *Ibid.* 287.

it appearing that they had paid thoſe ſums with full knowledge of the bankruptcy, the ſet-off was diſallowed.

The court were of opinion that the plaintiffs having once recovered this ſum from the Meſſrs. *Hankeys*, they could not recover it a ſecond time againſt the defendant.

Aſhhurſt, J. ſaid: "It is admitted very properly, that the plaintiffs cannot affirm and diſaffirm the ſame tranſaction: then try this queſtion by that teſt. This was no ſpecific money of the bankrupt paid to the defendant; it was only a payment in the common courſe of buſineſs by her bankers who had, prior to that, received large ſums of money belonging to the bankrupt: The plaintiffs firſt brought an action againſt the bankers for all the money received by them on the bankrupt's account, againſt which demand they offered to ſet-off this as well as ſeveral other ſums which they had paid on account of the bankrupt; to this the aſſignees objected, inſiſting that thoſe payments were made with their own money, and not with that of the bankrupt. But in the preſent action they ſay it was a payment with the money of the bankrupt; and, the defendant having received it with knowledge of the bankruptcy, they inſiſt that they have a right to recover it back. It has not been attempted to be diſputed but that the defendant was a *bonâ fide* creditor of the bankrupt; and a payment by her to him, although with notice of the bankruptcy, would have been good as againſt all perſons but the general creditors. If therefore he do no injury to the creditors, he does not hold it againſt conſcience. The bankrupt's eſtate has not been injured at all by this payment; for the aſſignees have already received this ſum from the *Hankeys*, then they ſay that they have a right to bring this action againſt the defendant, becauſe otherwiſe the *Hankeys* cannot recover it back. But the *Hankeys* paid this ſum, knowing of the bankruptcy, and perhaps have no right to recover it back. But that is immaterial as far as it reſpects the aſſignees; they are now interpoſing between two creditors in a caſe in which the general body of creditors have no concern."

So, where a policy broker pays a ſum of money *of his own* on account of his principal, a bankrupt, to a trader who held certain policies of aſſurance of the bankrupt, which had been delivered to him after a ſecret act of bankruptcy in ſatisfaction of a juſt debt, the aſſignees cannot recover the money ſo paid, though the broker

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in ſettling his account with the aſſignees, retained the amount of the money paid.

Thus, in the caſe of *Hovil* and others, aſſignees of *Wardell* a bankrupt, v. *Pack* and *another*, (*e*) which was an action of *aſſumpſit* for money had and received by the defendants, to the uſe of the plaintiffs, as aſſignees of *Wardell* a bankrupt. At the trial a verdict was found for the plaintiffs for 230*l.*, ſubject to the opinion of the court of *King's Bench* on the following caſe:

In *November* 1802, *Wardell*, being a trader, indorſed a bill of exchange which would become due on the 8th of *February* 1803, and which, in *December* 1802, was indorſed over to the defendants for a valuable conſideration. On the 27th *January* 1803 *Wardell* failed in a ſhip, of which he was the ſole owner, with a cargo for the *Weſt Indies*, having only a few days before committed a ſecret act of bankruptcy. The bill was refuſed payment when due, and notice thereof given to the proper parties. In *July* 1803, the bankrupt's wife cauſed inſurances to the amount of 3400*l.* on the ſhip and cargo to be effected for the bankrupt by Mr. *De Beaume*, a policy broker reſiding in *London*, and who delivered them to Mrs. *Wardell*, without being paid the premiums. Mrs. *Wardell* ſoon afterwards applied to the defendants, whoſe debt was ſtill unpaid, and who had brought an action againſt the drawer of the bill, abovementioned, and obtained judgment by confeſſion in ſuch action, to take another bill for payment of the amount of the firſt, which ſhe indorſed as attorney for her huſband, and to ſtay execution, until ſuch ſecond bill ſhould become due: and as an inducement to them to do ſo, offered to depoſit the policies with them as a ſecurity for the payment of ſuch ſecond bill. This the defendants agreed to, and the policies were accordingly depoſited with them. In *July* 1803 the ſhip and cargo were captured by the *French*. On receiving intelligence of the capture, Mrs. *Wardell* applied to the defendants to deliver up the policies, for the purpoſe of receiving the amount of the ſubſcription; but they refuſing to do this without ſecurity for the payment of their debt, (the ſecond bill having alſo been diſhonoured,) *De Beaume*, at her requeſt, accepted a bill of exchange at one month for 230*l.* the amount of the defendant's debt; and the policies upon this were, at

(*e*) 7 *Eaſt Rep.* 164.

the requeſt of Mrs. *Wardell* delivered up to him. This bill was regularly paid, when due by Mr. *De Beaume*, who had received the amount of the policies of inſurance from the underwriters. The bankrupt returned to *England* in *February* 1804; and on the 9th of *March* following a commiſſion of bankrupt was iſſued againſt him, under which the plaintiffs were choſen aſſignees, and an aſſignment to them was regularly executed. *De Beaume* retained from the plaintiffs as aſſignees, out of the monies he had collected on the policies, the amount of the payment he had made to the defendants. *Wardell* had been a bankrupt twice before, once in the year 1786, and again in 1788, and had obtained his certificate under each of thoſe commiſſions, but had not paid a dividend of 15*s* in the pound under the laſt, and his creditors at that time ſtill remained unſatisfied. The queſtion for the opinion of the court was, whether the plaintiffs were entitled to recover? The court were of opinion that the plaintiffs were not entitled to recover. And Lord *Ellenborough*, C. J. ſaid "If you adopt *De Beaume*, as your agent on your own behalf, you muſt adopt him throughout, and take his agency *cum onere*. Your action, if any, muſt be againſt *De Beaume*; but it is impoſſible you can follow the money into the hands of the defendant, to whom it has been paid by your adopted agent. If this could be done, by the ſame rule you might follow it ſtill further through other hands. But if the defendants had paid it over to another, could you pretend to have the ſame right to follow it."

Lawrence, J. "The facts are, that the defendants having a demand upon the bankrupt upon a certain bill, his wife prevailed upon him to give it up, and to take another bill for the amount, and depoſited the policies of inſurance, which ſhe had procured from *De Beaume*, in their hands as a ſecurity. When ſhe applied to them to deliver up the policies, for the purpoſe of obtaining payment from the underwriters, they refuſed unleſs upon receiving ſecurity for the payment of their debt. This ſecurity was given by *De Beaume*'s acceptance, which he afterward paid: the money therefore, which the defendants have received, and for which the aſſignees of the bankrupt have brought this action, was the money of *De Beaume*, and not of the bankrupt; and therefore the aſſignees can have no title to recover it."

Le Blanc, J. "*De Beaume* muſt have paid his acceptance to the

the defendants, whether he had ever received the amount of the loſs on the policies from the underwriters or not. The payment was therefore made by him out of his own money."

So, an action for money had and received will not lie at the ſuit of aſſignees to recover the value of *India* ſtock re-transferred by a trader after his bankruptcy to a perſon who intruſted him with it for the purpoſe of voting. (*f*) For it is a new ſpecies of property ariſen within a few years, it is not money; perhaps an action might be framed ſo as to come at the juſtice of the caſe, but an action for money had and received will not lie in this caſe where no money was received.

If the aſſignees ſue upon a contract made by a bankrupt before his bankruptcy, they are bound by all the conditions annexed to it.

Thus, in the caſe of *Dobſon* and another aſſignees of *Patrick* v. *Lockhart*, (*g*) which was an action of *aſſumpſit*, for goods ſold and delivered by the bankrupt, before his bankruptcy, to the defendant. It appeared that on the 11th *October* 1788, the bankrupt and the defendant became bound to *S. Nicholſon*, and two other perſons, in 900*l.* conditioned to pay 450*l.* with lawful intereſt on demand; that on the 16th *May* 1789, the bankrupt, one *Foſter*, and the defendant, became bound to *J. Wakefield* and two other perſon in 1000*l*, conditioned to pay 500*l.* on intereſt, on the 1ſt of *June* 1789; that thoſe two bonds were executed by the defendant as a ſurety for the bankrupt, and for his debt only; that before the bankruptcy of *Patrick*, viz. on the 21ſt of *May* 1789, it was agreed between the defendant and the bankrupt, that in order to indemnify the defendant againſt theſe two bonds, the latter ſhould become bound to the former in 1400*l.* conditioned to pay 700*l.* with intereſt on the 13th of *February* 1790, and as a further imdemnity, that the defendant ſhould retain and keep ſuch money, not exceeding the money to be ſecured by the laſt bond, as ſhould at any time be due from *G. L.* and the defendant to the bankrupt in reſpect of any dealings between them in trade, until the two firſt bonds ſhould be ſatisfied, and that the defendant ſhonld, out of the money which ſhould be due from *G. L.* and himſelf to the bankrupt, retain and ſet off ſo

(*f*) *Nightingal* v. *Deviſme*, 5 Bur. 2589. *See alſo Jones* v. *Brinley*, 3 *Eaſt Rep.* 1. (*g*) 5 *Term Rep.* 133.

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much money, not exceeding the laſt bond, as he ſhould at any time pay on the two firſt bonds.

The court held that the aſſignees were bound by this agreement, and gave judgment for the defendant.

Lord *Kenyon*, Ch. J. ſaid: "This is an action for goods ſold and delivered by the bankrupt to the defendant; and the queſtion is, whether the plaintiffs, who are the aſſignees of the bankrupt, have a right, under all the circumſtances of the caſe, to exact payment for the goods. The defendant had various tranſactions with the bankrupt; among others, he became ſecurity for him in two ſeveral ſums of money; and at the time of becoming ſuch ſecurity the latter engaged that the defendant ſhould not be called upon to pay for the goods until he was indemnified againſt thoſe bonds. That agreement having been proved, I ſee no objection to it in point of law; I think it is a good defence to this action under the general iſſue, and that the defendant need not have pleaded it ſpecially. The conſequence is, that the plaintiffs have brought this action to enforce payment of a ſum of money which the defendant is not bound either in law or conſcience to pay under theſe circumſtances."

9. *Of an Action at Law by Aſſignees for Money or Goods of a Bankrupt attached in a Foreign Country by a Creditor reſiding in England, after Notice of the Aſſignment, &c.*

If a creditor, reſiding in *England*, with full knowledge of the bankruptcy of the debtor, attach money of the bankrupt's abroad the aſſignees may recover it back by action of *aſſumpſit* for money had and received.

Thus, in caſe of *Hunter* and others aſſignees of *Blanchard & Lewis*, bankrupts, v. *Potts*, (*b*) which was an action of *aſſumpſit* for money had and received, to which the defendant pleaded the general iſſue. On the trial a ſpecial verdict was found, which, after ſetting forth the formal parts, (namely, the trading, the petitioning creditor's debt, the bankruptcy, the commiſſion and aſſignment,) ſtated, that the bankrupts before their bankruptcy were indebted to the defendant on a contract made

(*b*) 4 *Term Rep.* 182. 2 *H. Bl.* 402. *S. P.*

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in *England*; at which time, and alſo at the time of the bankruptcy, and until the aſſigning of the attachment hereafter mentioned, all the parties were reſident in *England*; that after the iſſuing of the commiſſion of bankrupt and the making the aſſignment, the defendant, knowing thereof, gave orders to his attorney, in *Rhode Iſland, North America*, to attach the effects of the bankrupts in that iſland, in conſequence of which the attorney in *May* 1785, attached in the regular way, certain monies in the hands of *J. and W. Ruſſell*, which were due from them to the bankrupts at the time of the bankruptcy; and in *November* 1786, obtained in the Court of *Common Pleas in Rhode Iſland*, a regular judgment againſt the bankrupts for 496*l.* 12*s.* 9*d* and coſts; which ſum he afterwards received, and remitted to the defendant in *England*, who claims to hold the ſame to his own uſe. The verdict alſo ſtated that the proceedings of the Court in *Rhode Iſland* were continued by imparlances from *May* 1785 to *November* 1786, at the requeſt of the *Ruſſells*, in order that the bankrupts might have notice of ſuch proceeding.

Lord *Kenyon*, Ch. J. delivered the opinion of the court in favour of the plaintiffs. He ſaid: "In the argument on this caſe many quotations were made from the writers on the civil law, which it is not neceſſary to conſider in determining this queſtion. Generally ſpeaking, it muſt be admitted that perſonal property muſt be governed by the laws of that country where the owner is domiciled. Neither do we mean to break through the rule that the courts of one country ought to pay a proper deference to the deciſions of the courts in another, having competent juriſdiction, where the facts on which the deciſion was made were fairly diſcloſed to ſuch court. But the general queſtion here is whether the aſſignment, which was executed by the commiſſioners of the bankrupt was ſufficient to veſt the bankrupt's property in the plantations abroad, in the aſſignees under the commiſſion; becauſe if it did ſo veſt at the time of the aſſignment, it is immaterial to conſider in this caſe how far the relation under the bankrupt laws ſhould take effect in *Rhode Iſland*, ſince the aſſignment was executed anterior to the time when the attachment ſuit was there commenced. Therefore the only queſtion here is, whether or not the property in that iſland paſſed by the aſſignment, in the ſame manner as if the owner (the bankrupt) had aſſigned it by his voluntary act. And that it does ſo paſs cannot be doubted, unleſs there were ſum

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poſitive law of that country to prevent it. Every perſon having property in a foreign country, may diſpoſe of it in this: though indeed if there be a law in that country directing a particular mode of conveyance, that muſt be adopted; but in this caſe no law of that kind is ſtated, and we cannot conjecture that it was not competent to the bankrupt himſelf, prior to the bankruptcy, to have diſpoſed of his property as he pleaſed. Now the bankrupt ſtatutes have expreſsly enacted that the commiſſioners may aſſign all the property of the bankrupt in the moſt extenſive words; and therefore on the general reaſon of the thing, if there be no poſitive deciſion to the contrary, do doubt could be entertained but that, by the laws of this country, uncontradicted by the laws of any other country where perſonal property may happen to be, the commiſſioners of a bankrupt may diſpoſe of the perſonal property of a bankrupt reſident here, though ſuch property be in a foreign courtry,"—Judgment was accordingly given for the plaintiffs.

So, in the caſe of *Sill* and others v. *Worſwick*, (*i*) it was determined, that if after an act of bankruptcy committed, but before an aſſignment, a creditor of the bankrupt makes an affidavit of debt in *England*, by virtue of which he attaches, and receives, after the aſſignment, money due to the bankrupt in the *Weſt Indies*, the aſſignees may recover it back in an action for money had and received.

10. *In what Caſes the Aſſignees of a Bankrupt are liable to an Action of* Aſſumpſit *for Rent, and for Money Had and Received, &c.*

Aſſignees may either affirm or diſaffirm the contract of a bankrupt (*k*). If they affirm it, they muſt be bound by the tranſaction in the ſame manner as the bankrupt himſelf would have been. But if they diſaffirm the contract they are not liable to be charged, though it come to them by the general aſſignment; therefore the aſſignees are not liable to be charged for rent of premiſes aſſigned to them, unleſs they *take poſſeſſion* (*l*).

(*i*) 1 *H. Bl.* 665. (*k*) *Per. Lord Kenyon*, 4 *Term Rep.* 217.
(*l*) *Bourdillon* v. *Dalton and others*, *Peake's Cas. N. P.* 238.

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So, where a tenant from year to year of a house at a yearly rent becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year, the lessor cannot maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy during the time that elapsed before the bankruptcy.

Thus, in the case of *Naish* v. *Tatlock* and others, assignees of *Lidiard*, a bankrupt, (*m*) which was an action of *assumpsit* for *use and occupation*. Upon the trial a verdict passed for the plaintiff, subject to the opinion of the court of Common Pleas, on the matter of law arising upon the facts found by the jury, considered with reference to the declaration as follows: "It was stated in the first count of the declaration, that the defendants were indebted to the plaintiff, in seventy pounds, for the use and occupation of certain apartments in his house, before that time used, occupied, possessed, and enjoyed, as well by one *Thomas Lidiard*, whose term and estate therein the defendants afterwards had, as by the defendants, at their special instance and request, for one year then elapsed, from and under and as tenants thereof respectively to the plaintiff, and by her permission; and being so indebted they promised to pay. The second count was upon a *quantum meruit*, in consideration that the plaintiff at the like special instance and request of the defendants had permitted the said *Thomas Lidiard*, whose estate, term and interest the defendants had, as well as the defendants themselves respectively, to have, use and occupy the same apartments, and that *Lidiard* and the defendants respectively had accordingly had, used, and occupied, the same for a year, by such permission of the plaintiff. The material facts of the case were that after *Lidiard* had occupied those apartments, for a certain part of the year, under an agreement to pay seventy pounds a year for them, he became a bankrupt, and the defendants, who were his assignees, then entered into possession and continued in the occupation of them for the rest of the year, and that after the expiration of the year. Mr. *Tatlock* one of the defendants wrote the following note to Mr. *Ward* the solicitor for the commission of bankrupt against *Lidiard*; "Mr. "*Tatlock*'s respectful compliments to Mr. *Ward*, the bearer is a

(*m*) 2 *H. Bl.* 319.

"Mrs.

" Mrs. *Naish* a widow lady, whom Mr. *Lidiard* rented his house " in *Austin Friars* of; there is due to her for rent fifty pounds, " we having paid her twenty pounds since the commission; there " is also five pounds fifteen shillings and sixpence for coals, like- " wise for our use since the commission; now I wish you to give " an order upon Mr. *Tallock* for the above, as we certainly are " bound to pay her. *London*, 20th *July*, 1792." This paper was delivered to Mrs. *Naish*, the plaintiff, by *Tallock*, to be delivered to *Ward*; and it was delivered; but some dispute arising, the fifty pounds were not paid, in consequence of which this action was brought, and then a proportion of the annual rent of seventy pounds for that part of the year, during which the defendants were in the occupation of the premises, was paid into court. Upon this state of facts, it was insisted on the part of the defendants, that the plaintiff had not proved her case stated in the declaration. The question was saved for the opinion of the Court, after it had been left to the jury to say distinctly, whether the agreement was or was not to pay the rent annually, which they found in the affirmative; and whether the seventy pounds mentioned in the note of the 20th *July* 1792, was the year's rent, or was a sum which the defendants had agreed to pay for their own occupation; as to which the jury found, that it was the rent for the whole year, including the time of *Lidiard*'s occupation."

The Court determined that the evidence on the part of the plaintiff was not sufficient to maintain the action.

Lord Ch. J. *Eyre* said: " It is stated in both the counts of the declaration, that plaintiff's demand is founded upon a use and occupation by *Lidiard* for a part of the year, and by the defendants for the residue of the year, both occupations being had by the permission of the plaintiff, *at the special instance and request of the defendants*. These latter words, often mere words of form, are here words of substance and operative, connecting the occupation of the defendants for which they were bound to make a satisfaction, with the occupation of *Lidiard* a stranger, for whose occupation, *primâ facie* at least, the defendants were not bound to make a satisfaction. In point of fact it was not at the request of the defendants that *Lidiard* was permitted to occupy; the defendants had no relation to *Lidiard*, but as his assignees; and that relation did not commence till the close of his occupation; that relation therefore alone could not have the effect of making them personally liable

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to anſwer for his occupation before his bankruptcy. The averment that he had been permitted to occupy at the requeſt of the defendants, is therefore ſubſtance, and not mere form, and a failure in the proof of it is fatal. The framer of this declaration ſeems to have been aware of this difficulty, and to have endeavoured to obviate it by throwing into the declaration the words "whoſe term and eſtate therein" in the firſt count, and the words "whoſe eſtate term and intereſt" in the ſecond, the defendants had. This very looſe and general averment ſeems to have been calculated to facilitate the paſſage of the other averment "*of the defendant's requeſt*" through the cauſe at *niſi prius*, and if it had paſſed ſmoothly there, would probably have been the averment which would have been relied upon after a verdict, and this laſt would have been diſcarded. Looſe, informal and indiſtinct as it is, it might ſerve to introduce at the trial, that *Lidiard* was a tenant for a year at a rent of ſeventy pounds, payable at the end of the year, and that the aſſignees having entered into poſſeſſion as aſſignees, entered under that demiſe, and became aſſignees of the leaſe, and bound to pay the rent which became due after the aſſignment. It might then be with great colour urged, that rent due is recoverable in an action for uſe and occupation, and if the rent is really due, the manner of ſtating the uſe and occupation ſeems to have more form than ſubſtance in it. I was for a time inclined ſo to conſider the caſe, but upon further conſideration of the nature of the action on the caſe for uſe and occupation, and of the ſcope and purview of the ſtatute 11 Geo. 2. c. 19. we are of opinion, that the circumſtances under which the defendants ſucceeded to the occupation of the premiſes, will not prove or diſpenſe with the proof, that *Lidiard*'s occupation, was at the requeſt of the defendants. The action for uſe and occupation, is in its own nature collateral to the action on a contract for rent upon a demiſe, and it was ſo holden in the caſe of *Johnſon* v. *May*, 3 Lev. 150: if the defendant did in fact uſe and occupy by the permiſſion of the plaintiff, and had expreſsly promiſed to pay, though the plaintiff had no title, or perhaps an equitable title only, the action lay.

Under the ſtatute a landlord, who has rent owing to him, is allowed to recover, not the rent, but an equivalent for the rent, a reaſonable ſatisfaction for the uſe and occupation of the premiſes, which have been holden and enjoyed under the demiſe, by the action for the uſe and occupation; and it is provided on his behalf, that if the demiſe be produced againſt him, it ſhould not defeat his action, as it would have done before the ſtatute, but

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the fixed rent ſhall only be uſed as a medium, by which the uncertain damages to be recovered in this form of action ſhall be liquidated. What is given by this ſtatute? A reaſonable ſatisfaction for the uſe and occupation is the thing intended to be given; the form of action marked out (being enlarged by a neceſſary conſtruction, ſo as to be allowed to be maintained without an expreſs promiſe) is the proper form in which ſuch reaſonable ſatisfaction is to be recovered; but the reaſonable ſatisfaction, which in its own nature muſt apply to ſomething ſpecific, by which it can be eſtimated, being here given for uſe and occupation, and for nothing elſe, it is a remedy, which in its own nature is not coextenſive with a contract for rent, nor does it ſeem to have been within the ſcope and purview of the act to make this remedy coextenſive with all the remedies for the recovery of rent, claimed to be due by the mere force of the contract for rent. The ſtatute meant to provide an eaſy remedy in the ſimple caſe of actual occupation, leaving other more complicated caſes to their ordinary remedy. In the caſe now under conſideration, the plaintiff muſt be left to ſuch other remedy as ſhe may be adviſed to purſue: ſhe cannot recover in an action for uſe and occupation without proof of the uſe and occupation alledged; and if ſhe can recover at all in this form of action, againſt one man for uſe and occupation by another, (as to which we give no opinion) it muſt be upon the ground of that occupation having been permitted at his requeſt, and that requeſt muſt be proved. The conſequence is that a nonſuit muſt be entered, and the *poſtea* delivered to the defendants."

If aſſignees receive money ariſing from property delivered to the bankrupt for a particular purpoſe, and which was in his poſſeſſion at the time of his bankruptcy, ſuch money may be recovered from them in an action of *aſſumpſit*.

Thus, in the caſe of *Scott* and others, v. *Surman* and others aſſignees of *Richard Scott* a bankrupt (*n*) which was an action of *aſſumpſit* for money had and received. The plaintiffs being partners beyond ſea conſigned a quantity of tar to *Richard Scott*, the bankrupt, brother of the plaintiff *Scott*, as their factor. There had been mutual dealings between the two brothers, which were then unſettled. The ſhip and goods arrived in the *Thames* from *Carolina*, 22d *March* 1739. Their factor received the bill of lading,

(*n*) *Willes Rep.* 400. *See alſo* Zinck *v.* Walker, 2 *Bl. Rep.* 1154. *S. P.*

and following, to *Cornelius* and *Jeremiah Owen*; and it was agreed that the tar should be paid for in promissory notes payable four months after the delivery of the goods, and that a debt of 31*l.* due from the factor to the vendees on his own account should be deducted. 1st *April* 1740, the vendees gave the factor in part two promissory notes, one for 66*l.* 13*s.* 4*d.*, the other for 102*l.* 6*s.* 8*d.* which with the 31*l.* made up 200*l.* On the 3d *April* 1740, the factor committed an act of bankruptcy, and a commission issued on the 5th on the petition of one of the defendants. The bankrupt delivered up the two notes to them as assignees, and they afterwards received the money. They had likewise confirmed the sale, and settled the account with the vendees, and received the balance, being 378*l.* 14*s.* They also received the bounty money allowed by act of parliament to the importers, being 299*l.* 8*s.*

The defendants insisted that, as assignees, they were entitled to all the money which they had received, and that the plaintiff's should come in as creditors under the commission.

The court, however, were of opinion that the plaintiffs were entitled to recover the sum of 327*l.* 10*s.* deducting the 31*l.* for which the plaintiff's could only come in as creditors

Lord Ch. J. *Willes* in delivering the opinion of the court, said: "We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the plaintiff's could not have recovered any thing in this action, but must have come in as creditors under the commissioners, as is laid down in the case of *Whitcomb*, v. *Jacob*, 1 *Salk.* 161, and in many other cases. But the reason of this is so very plain that I need not cite any other, because money has no car-mark and therefore cannot be followed.

We are likewise all agreed that if the goods had remained in specie unsold in the bankrupt's hands at the time of the bankruptcy, the plaintiffs might have recovered them in an action of trover, and that they could not be applied to pay the bankrupt's debts, according to the case of *L'Apostre* v. *Le Plaistrier*, cited in 1 P. Wms. 318, adjudged in B. R. M. 1708. The case indeed of *Wyeman* v. *Vandeput*, 2 Vern. 203. seems to imply the contrary: but

it does not appear by that caſe whether the goods were conſigned to the bankrupt, as the buyer, or only as a factor; and beſides the caſe of *L'Apoſtre* and *Le Plaiſtrier*, which is long ſince, has determined the contrary. But the preſent caſe is a middle caſe between theſe two which I have mentioned, but I think may be determined on the ſame reaſons. For why are goods conſidered ſtill as the owners? becauſe they remain in ſpecie, and ſo may be diſtinguished from the reſt of the bankrupt's eſtate. But as money has no ear-mark, it cannot be diſtinguiſhed. Otherwiſe to be ſure, in reaſon, the thing produced ought to follow the nature of the thing out of which it is produced, if it can be diſtinguiſhed; and ſo long as it remains a debt, it is equally diſtinguiſhable; or if it be laid out in a particular thing, as the caſe in *Salkeld* is. And the notes are within the ſame reaſon. And we do not only found ourſelves on the reaſon of the thing but on ſeveral caſes which have been adjudged.

The general rule is, that if a man receive money which ought to be paid to another or to apply to a particular purpoſe to which he does not apply it, this action will lie as for money had and received, &c. So held in *Owen* 86, that if money be delivered by A to one to buy a horſe or any other thing, if he do not lay out the money accordingly, an action of *debt* will lie or an action *on the caſe* for ſo much money had and received to A's uſe. So in 1 *Salk.* 9. *Poulter* v. *Cornwall*, if a man receive money for a ſpecial purpoſe and neglect or refuſe to apply it to the uſes for which he received it, an action on the caſe will lie as for money had and received. And though a bill in equity may be proper in ſeveral of theſe caſes, yet an action at law will lie likewiſe; as if I pay money to another to lay out in the purchaſe of a particular eſtate or any other thing, I may either bring a bill againſt him, conſidering him as a truſtee, and praying that he may lay out the money in that ſpecific thing, or I may bring an action againſt him as for ſo much money had and received for my uſe. Courts of equity always retain ſuch bills when they are brought under a notion of a truſt, and therefore in this very caſe, have often given relief where the party might have had his remedy at law, if he had thought proper to proceed that way.

To apply this general rule to the preſent caſe. The aſſignees having received this money which belongs to the plaintiffs, and ought not to be applied to pay the bankrupt's debts, they ought to have paid it to the plaintiffs, and not having done ſo, this action will

will lie againſt them for ſo much money had and received to the uſe of the plaintiffs. But I need not rely on the general rule only, for this very point now in queſtion has been twice ſolemnly determined. Firſt in the caſe of *Gurrat* v. *Cullum*, T. 9 *Anne*, B. R. Bul. N. P. 42, which was thus. The plaintiff being in Ireland, employed *Burtwell* and *Maſon* as his factors in *London* to ſell goods for him, which he had ſent to them. They ſell a parcel to *J. S.* for 20*l.* the plaintiff not knowing to whom they were ſold, nor J. S. whoſe goods they were; but they were delivered to him as the goods of B and M by a bill of parcels, and charged to their account in their books mutually. B and M before payment became bankrupts, and their debts are aſſigned by the commiſſioners to the defendant, who afterwards receives the 20*l.* of J. S. The plaintiff brought an action for *money had and received* to his uſe; and this matter being referred by *Holt* for the opinion of the *King's Bench*, judgment was given on argument for the plaintiff. Afterwards at Guildhall before Lord Chief Juſtice *Parker*, this caſe was cited and allowed to be law, becauſe though it was agreed that payment by J. S. to *Burtwell* and *Maſon*, with whom the contract was made, would be a diſcharge to J. S. againſt the principal, yet the debt was not in law due to them, but to the perſon whoſe goods they were; and therefore it was not aſſigned to the defendant by a general aſſignment of their debts, but remained due to the plaintiff as before; and being paid to the defendant, who had no right to have it, it muſt be conſidered in law, as paid for the uſe of him to whom it was due, and ſo an action will lie as for money had and received to his uſe."

So in the caſe of *Tooke* v. *Hollingworth and others aſſignees of Daniel*, (*n*) which was an action of *trover*, for three bills of exchange, and a certain quantity of guineas. A ſpecial verdict was found, ſtating, That two years before the bankruptcy of *Daniel*, it was agreed between the plaintiff, a merchant reſiding at *Mancheſter*, and *Daniel* then of *London*, a goldſmith, that the latter ſhould purchaſe of the former all the light gold coin of this realm, which the plaintiff ſhould ſend from *Mancheſter* to *Daniel* in *London*, at a certain ſtated price to be paid by *Daniel*, to wit, at the rate of 20*s.* 11*d.* for each guinea; and that the plaintiff ſhould from time to time draw bills of exchange upon *Daniel*, for the money due to the plaintiff upon ſuch ſale of the light gold, which bills ſhould

(*n*) 5 *Term Rep.* 215. 2 *H. Bl.* 501. *S. C.* in error.

be made payable at the end of two months from the reſpective dates thereof; and that *Daniel* would alſo from time to time accept other bills of exchange, drawn by the plaintiff for his own convenience; but in ſuch caſe the plaintiff ſhould remit value to *Daniel* to the amount of ſuch acceptances, to anſwer together with the light gold for the different bills ſo drawn on *Daniel*; by reaſon of which agreement an account ſubſiſted between them, upon which, at the time of the bankruptcy of *Daniel* herein after mentioned, *Daniel* was under acceptances for the plaintiff, in the courſe of their dealings under the contract, to the amount of 873*l.* 7*s.* 6*d.* which ſum exceeded the value of all the gold and bills remitted by the plaintiff to *Daniel*, including the gold and bills in the declaration mentioned. Independently and excluſively of the ſaid acceptances upon the balance of the ſaid account, *Daniel* at the time of his bankruptcy was indebted to the plaintiff in 531*l.* 7*s.* 7*d.*; and none of the bills ſo accepted by *Daniel* for the plaintiff, at the time of the ſending of the money and three bills of exchange hereafter mentioned, were due or payable. The plaintiff being poſſeſſed of the three bills of exchange in the declaration mentioned, (the ſame being then unpaid, and of the value, &c. therein mentioned) and alſo of the 213 light guineas, and 19 light half guineas, as of his own bills of exchange and monies, in purſuance of the ſaid agreement ſo made with *Daniel*, and in order to enable him to pay the ſaid bills ſo accepted by him for the plaintiff, when they ſhould become due, (and being then wholly ignorant of *Daniel*'s being a bankrupt as hereafter is mentioned) late of the evening of the 19th of *July* 1791 ſent by the mail-coach at *Mancheſter*, which goes from thence to *London*, the ſaid bills and money, in the ſaid declaration mentioned, in a box directed for *Daniel*, and paid the carriage thereof; which bills ſet out from *Mancheſter* for *London* early in the morning of the 20th of *July*, and the monies were then and there partly cut, and partly uncut, and the plaintiff of the ſame day, by the ſame mail, alſo ſent a letter addreſſed to *Daniel*, in which he adviſed *Daniel* that he had ſent to him the money and bills mentioned in the declaration, and tranſmitted to him an account of ſome light gold and bills which he had ſent on a former day, and alſo an account of the bills drawn by the plaintiff on *Daniel* (in number ſix) ſince his laſt letter, a few days before. None of the drafts ſo adviſed to be drawn upon *Daniel* by this letter were ever accepted by him. The letter and box containing the three bills of exchange and monies, afterward on the 21ſt of *July*, were delivered

vered to one *Joſeph Heathcote* (the meſſenger under the commiſſion) at *Daniel's* houſe in *London*, the meſſenger having been in poſſeſſion from the 19th of *July* of the houſe and of the goods and effects of *Daniel*, and the meſſenger paid the porterage for the ſame. The verdict then ſtated that *Daniel* had committed an act of bankruptcy on the 6th of *July* 1791 by abſconding; that the commiſſion iſſued on the 19th of *July* on which day at 3 o'clock in the afternoon, *Daniel* was declared a bankrupt; that on the 30th of *July* the aſſignment was made to the defendants, after which the meſſenger delivered the bills and guineas to the defendants, who at the time within mentioned, as ſuch aſſignees, &c., refuſed to deliver the ſame upon demand to the plaintiff, and converted, &c. That after the commiſſion iſſued, and before any of the bills drawn by the plaintiff and accepted by *Daniel* were paid by *Daniel* or by the defendants, or preſented to them for payment, and before the converſion above ſtated, the plaintiff paid the amount of them the ſeveral holders; and that *Daniel's* eſtate was thereby wholly exonerated therefrom. And that the plaintiff was wholly ignorant of *Daniel's* bankruptcy until after the delivery of the bills and money to the defendants.

The Court of *King's Bench* gave judgment for the plaintiff: but Mr. Juſtice *Buller* diſſented from this judgment. A writ of error was afterwards brought into the *Exchequer Chamber*, where, after two arguments at the bar, the judgment of the court of *King's Bench* was affirmed, and Lord Ch. J. *Eyre*, in pronouncing the judgment of the *Exchequer Chamber*, ſaid (*o*): "We are all of opinion that this judgment ought to be affirmed. I ſhall ſtate very ſhortly the reaſons which have induced me to concur in that opinion. The right of the parties to the light gold and bills, which are the ſubject of this action, appears to me to depend principally upon the true conſtruction of the original agreement between *Tooke* and *Daniel*, made two years and upwards before the bankruptcy. That agreement conſiſted of two parts; one being a contract for a bargain and ſale of light gold by *Tooke* to *Daniel* at a given price, to be paid for by bills of exchange, payable at two months, a ſimple and unembarraſſed tranſaction; the other being a contract, the effect of which was that *Daniel* ſhould become *Tooke's* banker, that he ſhould accept his bills, *Tooke* remitting value to the amount of

(*o*) *Vide* 2 *H. Bl.* 501.

such acceptances, in bills and in light gold. That is plainly the effect of the latter part of the agreement. They might have dealt as mere merchants, the one selling and the other buying this article of light gold, and paying for it according to agreement. And had this been a case of that kind, the transaction would have had one complexion, and the argument upon it, I think, would have taken one course. But as they might act in that manner, so they might upon the latter branch of the agreement act as principal and factor, or principal and banker, and not as mere merchants; and the idea of bargain and sale would enter no farther into their transactions upon that branch of the agreement than merely as it went to fix the price at which the light gold, which should be remitted from time to time, should be carried to the account of *Tooke* as cash, and be applied by *Daniel*, as *Tooke*'s agent, in payment of the acceptances which he had made on the credit of *Tooke*. There would certainly be this mixture of bargain and sale in any transactions which should take place even under the latter branch of the agreement, which in other respects would be the transaction of principal and factor, or pricipal and banker. But though there be this mixture, yet I think the case of the light gold cannot, in respect of that circumstance, be separated from the case of the bills. If *Daniel* was to be considered as a factor or banker only with respect to the bills, which should be remitted, he ought to be considered as banker or factor only, as to the light gold, with an agreement on his part to apply that light gold in payment of his acceptances, at the rate fixed in the former part of the agreement. In a word, the bargain and sale of the light gold, when considered under the second branch of the agreement, as a remittance to pay the acceptances, is but an incident in the business of the principal character of factor or banker. Now if it can be established, that *Tooke* and *Daniel* acted in the characters of principal and factor, their respective rights of property are very easily ascertained; the general right of property would be in *Tooke*, the special right of property in *Daniel*, to enable him to execute the commission with which *Tooke* had intrusted him; and he would also have a lien as against the general property of his principal, for the balance of his account. In this way of considering the case, we may lay all this story of the bankruptcy intirely out of the question. For suppose *Daniel* had remained solvent, *Tooke* might, at any time, have paid him his balance including any acceptances he might be under, and have withdrawn his effects out of *Daniel*'s hands; and

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there could have been no room for a queſtion between them but merely as to the profit upon the light gold eſtimated at the price in the agreement. Now I think that would depend on the queſtion, whether the light gold was ſold under the firſt part of the agreement, or whether it was to be conſidered as a mere article of remittance under the latter part; and according to my view of the caſe, I think that queſtion would be decided againſt *Daniel*. The aſſignees ſtanding in the place of *Daniel* certainly can be in no better condition than *Daniel* himſelf. The ground I have taken is very diſtinctly marked, and very well inforced in the argument of one of the Judges of the Court of *King's Bench* (*p*). He concludes ſomewhat differently from me, but the ground work is there. In my opinion it may be ſuſtained, it ſteers clear of all difficulties, and it reaches the ſubſtantial juſtice of the caſe, becauſe it meets the only argument of conſiderable weight that ſtruck my mind, namely, the poſſibility that the bankrupt might have been the creditor, and the injuſtice which would have been done to his eſtate, if theſe effects could on account of the bankruptcy have been withdrawn from the maſs of his eſtate. Now as the principle upon which my opinion proceeds is, that the bankrupt would have had a lien upon thoſe effects for every thing for which his eſtate was creditor, that difficulty is removed. Upon this ground I concur in thinking that the judgment in this caſe ought to be affirmed, and it is the unanimous opinion of the court, that the judgment be affirmed."

So, in the caſe of *Parke* v. *Eliaſon* and others, aſſignees of *Perſent* and *Bodecker*, Bankrupts (*q*), which was an action of *aſſumpſit* for money had and received by the defendants to the plaintiff's uſe. Upon the trial a verdict was found for the plaintiff for 4710*l.* 10*s.* 6*d.* ſubject to the opinion of the court on the following caſe: on the 17th of *Auguſt* 1799, M. *Cullen*, as agent for the plaintiff, wrote a letter to the bankrupts, who were then merchants in *London*, incloſing ſeveral bills of exchange, indorſed in blank by the plaintiff, amounting to 4837*l.* 10*s.* 11½*d.* as follows: "A friend of mine wiſhes to place the within incloſed bills, amounting to 4837*l.* 10*s.* 11½*d.* in your hands, to be allowed permiſſion to draw without renewals at two or three months,

(*p*) The Chief Juſtice is ſuppoſed, by the Reporter, to refer to the argument of Mr. Juſtice *Groſe*, in 5 Term *Rep.* 233.

(*q*) 1 *Laſt Rep.* 544.

allowing the commiſſion formerly mentioned in your letter. I ſhall be obliged by your making a calculation of the ſum to be drawn for. Your compliance will much oblige, &c."

		£.	s.	d.
13th *July* 1799.	*Sterling* and *Hunter*'s note at ſix months - -	1123	7	4
	Pardo on *Da Coſta*, nine ditto	733	11	0
	G. Frazer and Co. on *Hymen, Cohen* and Co. fourteen ditto - - -	474	0	0
2d *March* 1799.	*Parke* on *Aguilar* and Co. fourteen ditto -	1527	13	0
31ſt *October* 1797.	*Bogle* and *Jopps* on *Jopp*, twenty ſeven ditto -	378	19	7¾
31ſt *October* 1797.	Ditto on ditto twenty-ſeven ditto - - -	300	0	0
		£ 4837	10	11¾

On the 19th of *Auguſt* 1799, the bankrupts returned the following anſwer to Mr *Cullen*: "We have been duly favoured with your letter of the 17th, covering your remittances for 4837*l.* 10*s.* 11¾*d.*, which agreeable to your wiſhes we have diſcounted; and beg leave to hand you annexed an account thereof, by which you will obſerve there remains 471*l.* 6*s.* 6*d.* for you to value upon us at three months' date without renewal, which drafts will on preſentation meet due honor." On the 26th of *Auguſt*, *Cullen* wrote to the bankrupts as follows: "I duly received your eſteemed favour of the nineteenth current, and return you my beſt thanks for its contents. Mr. *John Parke* will draw for the bills diſcounted, which pleaſe to honour." On the 28th of *Auguſt* the bankrupts wrote to *Cullen* as follows: "Your eſteemed of the 26th inſtant apprizes us, that Mr. *John Parke* has your authority to draw for the bills which we diſcounted, which draft will be duly honored." On the 21ſt of *Auguſt* the plaintiff drew bills at three months date upon the bankrupts amounting to 4710*l.* 6*s.* 6*d.*, being the amount of the bills ſent to them as aforeſaid, allowing to the plaintiff intereſt for the three months, and deducting the commiſſion agreed upon: which bills were accepted by the bankrupts; but on account of their inſolvency they were unable to pay any

of

of their acceptances. In *September* 1799 *Perſent* and *Bodecker* became bankrupts, having in their hands the ſeveral bills received from the plaintiff unnegotiated; and for which the defendants as their aſſignees in and previous to *May* 1800, received the full amount. Three of the acceptances amounting to 1600*l.* given by the bankrupts to the plaintiff were negotiated by him, but in conſequence of their bankruptcy the bills were returned to him diſhonoured; and he tendered the ſame, and alſo the other ſix bills, amounting to 3210*l.* 6*s.* 6*d.*, which had not been negotiated, to the defendants on the 18th *September* 1800, previous to the commencement of this action, and demanded payment of the money which they had received upon the bills diſcounted by the bankrupts as before ſtated.

The Court determined that the bills had been placed in the hands of the bankrupts for a *particular* purpoſe, and therefore gave judgment for the plaintiff.

Lord *Kenyon*, Ch. J. ſaid, "Some confuſion has ariſen by ſuppoſing that there is a technical ſenſe annexed to the term diſcount, which cannot be gotten rid of; but that is explained by conſidering the true nature of the tranſaction. If the bills had been taken to the bankrupts upon a ſimple propoſal to diſcount them, the transaction would have been merely that of a purchaſe, and no queſtion could have ariſen. But this is nothing like a caſe of diſcount; but the bills were placed in their hands to anſwer a particular purpoſe. The firſt propoſal to them is to know to what extent the plaintiff might draw on them upon a depoſit of the bills. The bankrupts by their anſwer accept the offer, and ſpecify the amount to which they will honor the plaintiff's drafts, at three month's date. If this had been a new caſe, there might have been as much difficulty in it as there was in the caſe of *Teake* v. *Hollingworth*, which was very fully conſidered. There was indeed a difference of opinion among the judges of this court, but a majority thought with the plaintiff, and their judgment was afterwards confirmed in the Exchequer chamber upon a writ of error. The ſame principle was afterwards recognized in the caſe of *Bent* v. *Puller* (*r*), though the concluſion was different upon the facts, there diſcloſed; and it appeared to me that Mr. Juſtice *Buller*, who differed from the reſt of the court in the firſt caſe, re-

(*r*) Post 506.

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lented a little in the ſubſequent one; at any rate however the point is now ſettled, and the diſtinction clearly aſcertained between the caſe of bills paid into a banker's hands on a running account, and the caſe of a ſingle tranſaction like the preſent, where the depoſit is made for a ſpecial purpoſe. Here the bills were depoſited for the expreſs purpoſe of enabling the plaintiff to draw on the parties to a certain amount; and thoſe very bills having an ear-mark on them which diſtinguiſhed them from the maſs of the bankrupt's property, remained in ſpecie in their poſſeſſion at the time of the bankruptcy: then ſhall the aſſignees be permitted to appropriate them to the uſe of the bankrupt's eſtate when the other acceptances, in conſideration of which the depoſit was made, have not been paid? The aſſignees can only take the property of the bankrupts ſubject to every equity to which it was liable in their hands; and they having received theſe bills upon a condition which has failed, it is *ſecundum æquum et bonum* that the plaintiff ſhould recover back the value of them. I refer to the principles eſtabliſhed in *Tooke* v. *Hollingworth*, and *Bent* v. *Puller*, which are plain and intelligible to all men, and I muſt lean againſt making any exceptions to them upon nice diſtinctions, which would ſerve only to perplex commercial tranſactions."

But, where A. and B. have a general running account conſiſting of bills drawn by B. on C. in favour of A., and of bills and other ſecurities depoſited by A. with B., and upon the failure of B. and C., A. be obliged to take up the bills received by him from B. whereby the balance of the accounts is in favour of A., ſtill he cannot maintain trover for the bills depoſited by him with B., unleſs they were ſpecifically appropriated to anſwer B.'s drafts on C. in favour of A., and depoſited for that purpoſe expreſsly.

Thus in the caſe of *Bent* and another v. *Puller* and others, aſſignees of *Caldwell* and Co. (*s*), which was an action of *trover* for two bills of exchange, one for 1000*l.*, the other for 495*l.* 13*s.* brought under an order of the court of *Chancery*, on hearing the petition of the plaintiffs, in the bankruptcy of *Forbes* and *Gregory*, merchants in *London*, and in the bankruptcy of *Caldwell*, *Smith*, *Forbes*, and *Gregory*, bankers at *Liverpool*. On the trial before *Lord Kenyon* at *Guildhall*, the caſe appeared to be thus. The

(*s*) 5 *Term Rep.* 494. *See alſo* Bolton *v.* Puller *and others*, 1 *Boſ. and Pul.* 539. *S. P.*

plaintiff's

plaintiff's kept a banking account, with *Caldwell* and Co., which conſiſted ſolely of bills received from them by the plaintiffs, drawn on the bankrupts in *London*, (who acted as bankers for *Caldwell* and Co., at *Liverpool*) on one ſide, and of bills and negotiable ſecurities paid in by the plaintiffs on the other ſide. This account did not include any other dealings between them, though there exiſted other accounts between *R. Bent*, one of the plaintiffs, and *Caldwell* and Co. An intereſt account was regularly kept between the parites: when the bankers were in advance in caſh, they debited the plaintiffs account with intereſt during ſuch advance; when they had caſh in hand, they gave credit for intereſt upon it. The account was balanced every three months; and the banker charged 5*s. per cent.* commiſſion on the amount of the bills drawn by them, which conſtituted their profit. On the 28th *February* 1793, the account was balanced, in which was included all the bills received by the plaintiffs from *Caldwell* and Co. to that time; and ſuppoſing them all good, the plaintiffs would then have been debtors in 3882*l.* 8*s.* 8*d.* On the 1ſt, 8th, and 15th of *March* the plaintiffs received from *Caldwell* and Co. other bills amounting together to 445*l.* 6*s.* 3*d.* On the 13th of *March*, the plaintiffs ſent to *Caldwell* and Co. ſeven excife debentures, to the amount of 674*l.* 5*s.* 11*d.* which were received by the latter. On the 16th of *March*, *Forbes* and Co. ſtopped payment in *London*, at which time the plaintiffs had in circulation bills drawn on *Forbes* and Co. by *Caldwell* and Co. to the amount of 3326*l.* 7*s.* 4*d.* *Caldwell* and Co. ſtopped payment on the 18th of *March*. On the 16th of *March* about five in the afternoon the Plaintiffs ſent to *Caldwell* and Co. fifteen bills (of which the two in queſtion were part, the action being brought on two only to try the right) amounting to 3953*l.* 5*s.* 4*d.* which if placed to their credit, would turn the balance in their favour 799*l.* 16*s.* 4*d.* allowing all the bills received from *Caldwell* and Co. to be good; but thoſe bills were afterwards returned to, and taken up by the plaintiffs on the failure of the drawers and acceptors.

The queſtion was, whether the bills in queſtion were paid by the plaintiffs to the houſe of *Caldwell* and Co. on a particular or general account. The plaintiffs contended that they were depoſited with *Caldwell* and Co. for a particular purpoſe, namely to anſwer the bills given by *Caldwell* and Co. to the plaintiffs, and which were then running; and, that as the purpoſe for which they had been depoſited had failed, the plaintiffs had a right to have them reſtored. That theſe bills could only have been retained

tained by *Caldwell* and Co. for the purpoſe of indemnifying them againſt the payment of their own paper then in circulation; that, as that paper had been returned to, and taken up by the plaintiffs, the lien of *Caldwell* and Co. on the bills in queſtion (which exiſted only for a particular purpoſe) was deſtroyed, and that the defendants, who repreſented *Caldwell* and Co. could not ſet up any defence that *Caldwell* and Co. could not.

On the other hand it was inſiſted, on the part of the defendants, that the bills in queſtion were paid into the houſe of *Caldwell* and Co. on the general account that ſubſiſted between them and the plaintiffs, and were not depoſited with *Caldwell* and Co. to anſwer the ſpecific bills drawn by them on *Forbes* and Co. in favour of the Plaintiffs, for that ſo far from there being any proof that the latter was the agreement of the parties, the contrary was evident from their general courſe of dealing; and, that as the bills in queſtion had not only been paid into the houſe of *Caldwell* and Co. on that general account, but had been ſince actually negotiated by them to *Forbes* and Co. to whom they were then indebted, the plaintiffs had no right to recover them back. The jury after inſpecting the plaintiff's books, thought that the bills were paid to *Caldwell* and Co. on the general account between them and the plaintiffs; the plaintiffs were therefore nonſuited.

The Court of *King's Bench*, upon a motion for a new trial, were alſo clearly of opinion, under the circumſtances of the caſe, that the plaintiffs were not entitled to recover; and they accordingly refuſed the rule.

Buller, J. ſaid: "That in order to make it a ſpecific appropriation of bills there muſt be a lodging of a bill for a bill, or at leaſt ſeveral depoſited at once as one entire tranſaction to anſwer ſome particular purpoſe, whereas here the bills were paid in on a general running account, and the amount of the bills claimed as a depoſit not even correſponding with the account of thoſe for which they were ſuppoſed to be depoſited. And that this caſe muſt be conſidered in the ſame manner as if the queſtion had ariſen before the bankruptcy of *Caldwell* and Co. in which caſe the plaintiffs could not have compelled the bankers to deliver up the bills in queſtion on paying the others."

Lord *Kenyon* Ch. J. "I agree with my brother *Buller* that there muſt be either a bill pledged againſt a bill, or a tranſaction againſt a tranſ-

a tranſaction: but here the bills were coming in day after day, not for the purpoſe of oppoſing a bill on one ſide of the account to another on the other, but all were paid on one general account. The plaintiffs therefore are not entitled to recover theſe bills on the ground that the particular purpoſe for which they were depoſited has not been anſwered, becauſe it does not appear that they were depoſited to anſwer that particular purpoſe. On the trial, the jury, on inſpecting the books, thought that this was a general banker's account, and that there was no ſpecific appropriation of the bills in queſtion; and it appears to me in the ſame light."

When a bankrupt fraudulently procures a bill of exchange from another, and his aſſignees receive the money for the bill, it may be recovered from them in an action for money had and received.

Thus, in the caſe of *Harriſon* v. *Walker*, and another, aſſignees, &c. (*t*) which was an action of *aſſumpſit* for money had and received, brought to recover back a ſum of 190*l.* 10*s.* which had been received by the defendants in payment of bills remitted by the plaintiff to the bankrupts under the following circumſtances.

The bankrupts, previous to their bankruptcy, had ſent a bill of 193*l.* 17*s.* drawn by themſelves on one *Dawſon*, and purporting to be accepted by him, to the plaintiff to be diſcounted. The plaintiff on the 10th of *November*, ſent bills in return to the value of 190*l.* 10*s.* which arrived in town on the 12th, on which day one of the bankrupts abſconded, the other having gone off on the 10th. It was afterwards diſcovered that the acceptance was a forgery, which the bankrupts knew of, and it was proved, that the defendants had received the money for the bills ſent by the plaintiff.

Lord *Kenyon*, Ch. J. before whom the cauſe was tried, ſaid: "The aſſignment under the commiſſion paſſes only ſuch property as the bankrupt is conſcientiouſly entitled to. In this caſe the plaintiff had received no conſideration whatever for the bills by him remitted to the bankrupt; and he is entitled to have the value of them, which the defendant received, returned to him." The plaintiff accordingly obtained a verdict.

So, where there are mutual accounts between a bankrupt and

(*t*) *Peake's Caſ. N. P.* 111.

another

another perſon, and the latter (by miſtake) pays the whole of the debt due from him to the bankrupt, without deducting the money owing to him from the bankrupt, he may recover it back from the aſſignees, by action of *aſſumpſit* for money had and received.

Thus in the caſe of *Bize* v. *Dickaſon* and another, aſſignees of *Bartenſhlag* (*u*), which was an action for money had and received by the defendants as aſſignees of the bankrupt to the uſe of the plaintiff. And on the trial a verdict was found for the plaintiff, damages 661*l.* 9*s.* 10*d.* ſubject to the opinion of the court of *King's Bench*, on the following caſe, viz. That the bankrupt being an underwriter, ſubſcribed policies filled up with the plaintiff's name for his foreign correſpondents who were unknown to the bankrupt; that loſſes happened on ſuch policies to the amount of 655*l.* 9*s.* 7*d.* before the bankruptcy of *Bartenſhlag*, and were adjuſted by him; that a loſs on another policy to the amount of 6*l.* 0*s.* 3*d.* happened before the bankruptcy, but was not adjuſted till after that event; that the plaintiff paid the amount of the loſſes to his foreign correſpondents after ſuch bankruptcy; that the plaintiff had a commiſſion *del credere* from his correſpondents; was made debtor by the bankrupt for the premiums, and always retained the policies in his hands; that a dividend of 10*s.* in the pound was declared under the ſaid commiſſion on the 15th of June 1782; that at the time of the bankruptcy there was due from the plaintiff to the bankrupt, the ſum of 1356*l.* 0*s.* 3*d.* And there was due from the bankrupt for the above loſſes 661*l.* 9*s.* 10*d.*; that on the 15th of *March* 1782, the plaintiff paid to the defendants the ſum of 750*l.*, and on the 17th of *November* 1785, the further ſum of 606*l.* 0*s.* 3*d.* amounting to 1356*l.* 0*s.* 3*d.* and on the 18th of *November* 1785, the plaintiff proved the ſaid ſum of 661*l.* 9*s.* 10*d.* under the commiſſion; that the plaintiff never received any dividend under the commiſſion for or on account of the ſaid loſſes; that a final dividend of the effects of the ſaid bankrupt was declared by the ſaid commiſſioners on the 24th day of *January*, 1786; that on the 1ſt of *February*, 1786, previous to ſuch dividend being paid, the plaintiff cauſed a notice to be ſerved on the defendants, purporting that he had paid them the ſaid ſum of 1356*l.* 0*s.* 3*d.* under a miſtaken idea, without deducting therefrom the ſaid 661*l.* 9*s.* 10*d.* for the aforeſaid loſſes, on the ſaid ſeveral policies ſubſcribed by the bank-

(*u*) 1 *Term Rep.* 285. *See alſo* Grove v Dubois. *Ib.* 112. *S. P.*

rupt,

rupt, for whom he was *del credere* to the ſaid foreign correſpondents, and had paid ſuch loſſes accordingly; and cautioning them againſt making any dividend until he was paid the ſaid ſum of 661*l.* 9*s.* 10*d.*

The court decided that the aſſignees ought to have refunded the money in queſtion, and gave judgment for the plaintiff accordingly.

Lord *Mansfield* Ch. J. ſaid, "The rule had always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conſcience he ought, he cannot recover it back again in an action for money had and received. So, where a man has paid a debt, which would otherwiſe have been barred by the ſtatute of limitations, or a debt contracted during his infancy, which in juſtice he ought to diſcharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a miſtake, which there was no ground to claim in conſcience, the party may recover it back again by this kind of action."

11. *Of the Aſſignees liability to an Action of Aſſumpſit for a Dividend; and for an Allowance to a Witneſs.*

An action of *aſſumpſit* may be ſupported for a creditor's ſhare under an order for commiſſioners of bankrupt for a dividend: and in ſuch action, the proceedings before the commiſſioners are concluſive evidence of the debt; for after a debt is liquidated before the commiſſioners, it cannot be litigated but by an application to the great ſeal.

Thus, in the caſe of *Brown* and another, executors of *Gravatt* v. *Bullen*, aſſignee of *Fox* a bankrupt (*x*), which was an action of *aſſumpſit* for money had and received. The caſe appeared to be as follows: the teſtator, *Gravatt*, proved a debt of 410*l.* 1*s.* 7*d.* under the commiſſion againſt *Fox*. Afterwards a dividend of ſix ſhillings in the pound being declared by the commiſſioners, and *Gravatt* having died in the interval, the plaintiffs, as his executors, demanded their ſhare of the dividend, amounting to 123*l.* 0*s.* 1*d.*

(*x*) *Doug.* 407.

which

which the defendant refuſed to pay, alledging, that there was a balance due by *Gravatt* to the bankrupt. Upon which the plaintiffs brought this action. The defendant pleaded *non aſſumpſit*, and delivered a notice of ſet off.

At the trial it was contended, on the part of the defendant; 1. That the action could not be maintained, the only method of recovering debts proved under a commiſſion of bankruptcy, being by application to the great ſeal. 2. That if the action was maintainable, the conſideration and circumſtances of the debt muſt be gone into and proved, as in other actions of *aſſumpſit*. 3. That, if this was not incumbent on the plaintiffs, yet it was competent to the defandant to avail himſelf of the notice of ſet off.

Lord *Mansfield*, Ch. J. overruled all theſe points. He thought, firſt, that the action was maintainable; 2. That the only way to queſtion the proof of the debt taken by the commiſſioners, was by petition to the chancellor; that by the ſtatutes, the oath of the party is to be the proof of the debt, and a particular penalty is impoſed for ſwearing to a falſe debt; and, 3. That as the commiſſioners have a power of ſetting off mutual debts, the ſum proved muſt be taken to be the balance due; but if it ſhould happen, that only one ſide of the account appeared before the commiſſioners, or that any article was omitted on either ſide, on application to the great ſeal, the account would be again opened, and referred to the commiſſioners, or, in caſes of difficulty, to the maſter." The jury under his lordſhip's direction found a verdict for the plaintiffs, and on a motion to ſet aſide this verdict the court of *King's Bench* were of opinion that the direction of the Chief Juſtice was right.

Lord *Mansfield*, Ch. J. in delivering the opinion of the court upon this motion, ſaid: "I allowed the plaintiffs to recover their ſhare of the dividend againſt the aſſignees as money poſitively and expreſsly paid into the hands of the aſſignees for their uſe. We are all of opinion, that the direction was right, that the action was maintainable, and that, after a debt is liquidated before the commiſſioners it cannot be litigated, but by an application to the great ſeal."

With reſpect to witneſſes, it has been decided that the commiſſioners of bankrupt may make a verbal order upon the aſſignees of

of a bankrupt for the payment of the expences of a witneſs whom they have ſummoned to attend them, and that the ſame may be recovered againſt the aſſignees in an action of *aſſumpſit*.

Thus, in the caſe *Yarker* v. *Botham* and others (z). The declaration in this caſe ſtated, that a commiſſion of bankrupt having iſſued againſt *Thomas Cooper* and *John Brown* of *Lancaſter*, under which the defendants had been choſen aſſignees; that a ſummons ſigned by the major part of the commiſſioners named in the commiſſion was ſerved upon the plaintiff requiring him to attend the ſaid commiſſioners. That the plaintiff did attend in purſuance of ſuch ſummons, and was then and there examined: that the plaintiff was put to great expence in coming from *Lancaſter* for the purpoſe of ſo attending the commiſſioners, and that they had ordered a certain ſum of money to be paid to him for ſuch expences, for which ſum the action was brought.

By ſtat. 1 *Jac.* 1. *c.* 15. *ſ.* 10. power is given to the commiſſioners to ſummons perſons having, or ſuſpected to have or detain any part of the property of the bankrupt, and to examine them reſpecting it. And by the eleventh ſection of the ſame ſtatute, "ſuch witneſſes ſo ſent for ſhall have ſuch coſts and charges as the commiſſioners in their diſcretion ſhall think fit to allow."

The witneſſes for the plaintiff proved the attendance of the plaintiff, and that having made a demand of his expences before the commiſſioners, they ſettled the ſum to be allowed for the purpoſe: that *Botham* the defendant was preſent, and took an account of the plaintiff's demand, and promiſed to pay it.

This was the only evidence offered to ſupport the action.

The counſel for the defendant inſiſted that it was not ſufficient to ſuſtain the action: that the claim was under a proceeding before commiſſioners of bankrupt: that their proceedings were in writing, and that therefore an entry in writing in the proceedings to the effect ſet up by the plaintiff ſhould be ſhown in order to intitle him to recover, whereas this was only by parol. They further contended, that the plaintiff being himſelf a creditor, was bound to attend the commiſſioners on their ſummons, and therefore could not claim an allowance for what he was bound by law to do.

But Lord *Kenyon*, Ch. J. before whom the cauſe was tried over-

(z) 1 *Eſp. Rep.* 64.

ruled both objections. He ſaid, " that the act of parliament having given the commiſſioners a power to allow any perſon his expences whom they had called upon to attend them, that the order in the preſent caſe, was made in purſuance of that authority, and that it was not neceſſary that it ſhould be in writing." The plaintiff obtained a verdict accordingly.

12. *Of Monies received by Aſſignees who have been Removed.*

If an aſſignee of a bankrupt be removed, and aſſign his intereſt to the other aſſignees, they may maintain an action of *indebitatus aſſumpſit* againſt him, to recover any money which he may have received as ſuch aſſignee.

Thus in the caſe of *Smith* and others, aſſignees of *Lewis* and *Potter*, v. *Jameſon* and another (*a*), which was an action of *aſſumpſit* for money had and received. *Robert Jameſon* one of the defendants was a joint aſſignee with the plaintiffs, but was afterwards removed by order of the Lord Chancellor; and then re-aſſigned all his intereſt to the plaintiffs.

Whilſt he was an aſſignee, he had received ſeveral ſums of money which he had applied to the uſe of himſelf and the other defendant, (with whom he was in partnerſhip,) with the approbation of the other defendant, who knew that the money was part of the bankrupt's eſtate.

The preſent action was brought under the direction of the Lord Chancellor, to determine whether the eſtates of both defendants were liable, (they having become bankrupts,) and they were to be examined as witneſſes, if neceſſary.

The counſel for the defendant objected to the action in point of form. He ſaid that one defendant having been aſſignee of the bankrupt's eſtate, was himſelf entitled to receive this money, that he could not have maintained an action againſt himſelf, and having aſſigned only ſuch an intereſt as he himſelf had, could not in point of form be a defendant.

But Lord *Kenyon*, Ch. J. ſaid, " When an aſſignee aſſigns his intereſt, he diveſts himſelf of all right, and becomes a debtor to

(*a*) *Peake Cas. N. P.* 213.

thoſe

thoſe who remain aſſignees. *Choſes* in action have always been conſidered as aſſignable in caſe of bankruptcy." A verdict was therefore found for the plaintiffs.

13. *Of Promiſes, &c. to pay Money in Conſideration that the Aſſignees will forbear to examine a Bankrupt, or will ſtay Proceedings under the Commiſſion, &c.*

A promiſe made by a friend of the bankrupt, when he was on his laſt examination, that in conſideration that the aſſignees and commiſſioners would forbear to examine him touching certain ſums which he was charged with having received, and not accounted for, he would pay ſuch ſums as the bankrupt had received and not accounted for, is void, as being againſt the policy of the bankrupt laws.

Thus, in the caſe of *Nerot* v. *Wallace* and others, aſſignees of *Reily* and *Collins*, bankrupts, in error (*b*). It was an action upon the caſe in *aſſumpſit* brought in the Court of *Common Pleas*; and the declaration, after ſtating the trading by the bankrupts, the petitioning creditor's debt, the commiſſion of bankrupt, the appointment of the plaintiffs as aſſignees; that the three meetings were appointed, at the firſt of which *Reily* ſubmitted to be examined; but *Collins* not being prepared, prayed time, which was given him; that at the adjourned meeting, *Collins* was charged by the plaintiffs with having received divers ſums of money on the partnerſhip account, which he had not accounted for, when the commiſſioners required him to render a true account of the ſums which he had received on the partnerſhip account, and in what manner he had diſpoſed of the ſame, and were then about to examine him in due form of law, and to compel him to make a full diſcloſure touching the ſame, proceeded to ſtate, that in conſideration, that the plaintiffs, at the ſpecial inſtance and requeſt of the defendant, would forbear to proceed to have the examination of the ſaid *Collins* taken by and before the commiſſioners concerning the ſaid ſums, which had been received by the ſaid *Collins* on the partnerſhip account, and which had not been duly accounted for by him to the partnerſhip, and in what manner he had diſpoſed of the ſame; and that the commiſſioners would accordingly forbear and

(*b*) 3 *Term Rep.* 17.

deſiſt from taking ſuch examination; he, (the defendant,) undertook and faithfully promiſed the plaintiffs, as aſſignees, to pay to them all ſuch ſums of money which *Collins* had received on the partnerſhip account, and which had not been accounted for by him to the partnerſhip. The plaintiffs then averred, that they, confiding in ſuch promiſe, did forbear, and have always forborne to have ſuch examination, &c. taken before the commiſſioners, &c. and that the ſaid commiſſioners did forbear and deſiſt from taking ſuch examination, &c. The declaration then ſtated that *Collins* had, at the time of the making ſuch promiſe, received divers ſums of money, amounting in the whole to a large ſum of money, to wit, 1000*l.* on the partnerſhip account, and which had not been by him duly accounted for, which the plaintiffs demanded of the defendant, who refuſed to pay, &c. There were other counts for money paid, laid out, and expended, money had and received; and on an account ſtated.

The defendant pleaded the general iſſue. At the trial a verdict was given for the plaintiffs for 852*l.* A motion was afterwards made in the Court of *Common Pleas* to arreſt the judgment, which was refuſed. The defendant then brought a writ of error in the Court of *King's Bench.*

The Court determined that the conſideration of the promiſe in the firſt count was void, as being againſt the policy of the bankrupt laws.

Lord *Kenyon* Ch. J. ſaid: "The queſtion is, whether the verdict can be ſuſtained on the promiſe laid in the declaration? And I am clearly of opinion that it cannot. I do not ſay that this is *nudum pactum:* but the ground on which I found my judgment is this: that every perſon, who in conſideration of ſome advantage, either to himſelf or to another, promiſes a benefit, muſt have the power of conferring that benefit up to the extent to which that benefit profeſſes to go; and that not only in fact, but in law. Now the promiſe made by the aſſignees in this caſe, which was the conſideration of the defendant's promiſe, was not in their power to perform; becauſe the commiſſioners had nevertheleſs a right to examine the bankrupt, and no colluſion of the aſſignees could deprive the creditors of the right of examination, which the commiſſioners would procure them. The aſſignees did not ſtipulate only for their own acts, but that alſo the commiſſioners ſhould forbear to examine the bankrupt: but clearly they had no right to tie up the

the hands of the commiſſioners by any ſuch agreement. And if any propoſal of that ſort had been made to the commiſſioners, they, as acting in a public duty, would have been guilty of a breach of that duty in acceding to it. But it has been argued, that after verdict ſomething may be intended to ſupport it: but I do not ſee what we could preſume in this caſe to ſupport the verdict. It is impoſſible to ſay, that the bankrupt had only received a certain ſum, for then we muſt ſuppoſe, that the plaintiffs had proved a negative. If they had not precluded themſelves from any further examination, circumſtances might have led to ſuſpect that further ſums might have been diſcovered on a future examination. Then it has been ſaid, that the creditors would not ſuffer any inconvenience from this agreement not to examine the bankrupt, becauſe by another mode of examination, by a bill in equity, they might have obtained a full diſcloſure. But my experience in that court does not ſuggeſt the poſſibility of filing ſuch a bill in equity: and if there could be ſuch a bill, it cannot be contended that an anſwer to a bill in chancery is as likely a mode of obtaining a diſcovery as a *viva voce* examination before the commiſſioners. But the principal objection to the conſideration of this promiſe is, that it is contrary to the policy of the bankrupt laws. Theſe laws, which have been reviſed and corrected as much as human wiſdom will permit, have pointed out certain modes of examination, which the legiſlature has entruſted to certain perſons acting for the benefit of the creditors; all which might be put an end to by an agreement of this ſort, and without the conſent of the commiſſioners or the creditors at large. Therefore I am clearly of opinion, that the conſideration which was held out to the defendant below, was ſuch as the plaintiffs had no power to offer. If the creditors indeed had been called together, and they had conſented to the agreement, that might perhaps have altered the caſe: but they muſt have been convened by an advertiſement in the public papers for that particular purpoſe; for it was repeatedly determined by Lord *Hardwicke*, that a general power given to the aſſignees to compound debts was not ſufficient, but the creditors muſt be called together to conſider of each particular caſe.

But, an agreement by a friend of a bankrupt to pay all his creditors their full debts, in conſideration that they will not proceed any further under the commiſſion is good in law.

Thus, in the caſe of *Kaye* v. *Robert Britain*, which was an

(a) 6 Term Rep. 134

action of *covenant*. The declaration ſet forth certain articles of agreement, dated the 6th of *April* 1793, between *Iſaac Bolton* of the firſt part, the plaintiff of the ſecond part, *W. Hardham*, *E. Threlfal*, and *J. H. Hobrow*, the major part of the commiſſioners, named in a commiſſion of bankrupt iſſued againſt *I. Bolton*, of the third part, the defendant of the fourth part, "and the ſeveral creditors of the ſaid *I. Bolton* whoſe names were thereunto ſubſcribed and ſeals affixed, being *J. F.*," &c (naming them, in number 24,) of the fifth part; in which it was recited that a commiſſion of bankrupt had been awarded againſt *I. Bolton*, under which he had been declared a bankrupt, and that the plaintiff had been elected ſole aſſignee of his eſtate, but that the defendant, in order to put an end to any further proceedings under the commiſſion had, with the conſent and approbation of the bankrupt, the plaintiff, "and the ſeveral creditors, whoſe hands and ſeals were thereunto ſubſcribed and affixed," and alſo of the commiſſioners, agreed to pay and diſcharge all ſums of money due from the bankrupt, &c. ſuch demand to be firſt verified before a *Maſter in Chancery*, on oath, if required by the defendant, or to give ſecurity for the payment thereof to the ſatisfaction of the plaintiff "and the reſt of the creditors" within one month from the date thereof. By the deed it was agreed that the ſaid commiſſioners ſhould ſettle and aſcertain on oath as commiſſioners, the plaintiff's bill of coſts as ſolicitor under the commiſſion, and alſo for his trouble as aſſignee within the time aforeſaid; and that the amount thereof, together with the whole of his debt and demand proved under the ſaid commiſſion, as well as his mortgage on the *Hope* and *Anchor* ſhould be ſecured to be paid to the ſatisfaction of the plaintiff within one month, the defendant alſo agreed to indemnify and ſave harmleſs the plaintiff, his heirs, &c. from all coſts, damages, &c. reſpecting the ſtaying of the proſecution of the ſaid commiſſion, &c. Both the plaintiff and the defendant agreed to indemnify the commiſſioners; and "the ſeveral perſons, whoſe names were thereunto ſubſcribed and ſeals affixed," being the creditors of the ſaid *I. Bolton*, to wit, *T. F.* &c. (naming them again) agreed to accept the ſecurity of the defendant, and not to commence any ſuit againſt the plaintiff or the defendant on account of any debts from the bankrupt or the plaintiff as his aſſignee, or touching the ſaid commiſſion, &c. Then followed a covenant by the defendant to fulfil the agreement on his part: and a covenant by the plaintiff, to convey the bankrupt's eſtates to the defendant, or to ſuch perſon as he ſhould appoint,

point, and to account for all monies received by him, and to join in any application for a *ſuperſedeas* as ſoon as the agreement ſhould be carried into execution by the defendant: in which latter "the creditors, to wit, *J. F.*" (naming them again) agreed to join. It was then averred in the declaration, that at the time of making the above agreement, the ſum of 155*l.* 13*s.* 3*d.* was due from the bankrupt to the plaintiff, that that debt had been proved under the commiſſion, and that the plaintiff was at all times ready to verify it on oath, if required; that after the making of the agreement, the three commiſſioners ſettled and aſcertained on oath as commiſſioners the plaintiff's bill of coſts under the commiſſion, and aſcertained that the ſum of 91*l.* 3*s.* 9*d.* was due to the plaintiff for his bill of coſts; and that the further ſum of 164*l.* 5*s.* 1*d.* was due to the plaintiff, on mortgage on the *Hope* and *Anchor*; which ſums amounted together to 411*l.* 2*s.* 1*d.* Two breaches were then aſſigned; one, that the defendant had not given ſecurity to the ſatisfaction of the plaintiff, for the payment of the ſaid ſums of money, amounting to 411*l.* 2*s.* 7*d.*; the other that he had not ſaved the plaintiff harmleſs from all coſts, damages, &c. reſpecting the ſtaying of the proſecution of the ſaid commiſſion, &c. for that the plaintiff had loſt and expended 40*l.* in and about the ſtaying of the proſecution of the ſaid commiſſion, &c.

To this declaration there was a general demurrer.

But the Court decided that the agreement was not illegal, it having been made with the conſent of all the creditors. That it appeared by the different parts of the deed that all the creditors were parties to it; the words, the "creditors," which mean all, occurring in different places, and the words, "to the ſatisfaction of the plaintiff and the reſt of the creditors," occurring in another inſtance. And that the laſt objection was not warranted in fact; becauſe the averment was not that the commiſſioners had aſcertained what was due on the mortgage as well as for the bill of coſts; but the latter ſentence was diſtinct from the preceding one, and was only an averment by the plaintiff, that in fact ſo much was due to him on the mortgage. On the general queſtion, Lord *Kenyon*, Ch. J. ſaid, "This ſeems to be a fair agreement, and not contrary to the policy of the bankrupt laws. The object of thoſe laws is to have an equal diſtribution of the bankrupt's effects among his creditors: that will not be defeated by a friend of the bankrupt undertaking with the conſent of all the parties concerned, (not to divide among the creditors a fund which was probably inſufficient

ſufficient for that purpoſe, but) to pay to every creditor his full debt. And if the creditors are to receive the whole amount of their demands, it would be monſtrous to ſay that the bankrupt's eſtate ſhall ſtill be torn in pieces by the expence of the commiſſion."

Lawrence, J. "This caſe is very diſtinguiſhable from that of *Nerot* v. *Wallace*. It was there intended that the bankrupt ſhould receive his certificate without making a diſcloſure of his effects, and the conſideration of the promiſe was the ſuppreſſing of the bankrupt's examination, which was to be gone into for the purpoſe of aſcertaining, among other things, whether or not he was entitled to his certificate." Judgment was accordingly given for the plaintiff.

CHAPTER XI.

Of Executors and Adminiſtrators.

THE ſubject of the preſent chapter will be conſidered in the following order:

1. *Of an Executor's and Adminiſtrator's Right to the Debts and Contracts of the Teſtator or Inteſtate; and of Actions by them in reſpect thereof.*

2. *Of an Executor's or Adminiſtrator's Liability to be ſued upon Contracts made by the Teſtator or Inteſtate.*

3. *Of an Executor's Liability for Funeral Expences.*

4. *Of a Promiſe by an Executor to pay the Debt, &c. of his Teſtator.*

5. *Of a Debtor making his Creditor Executor; et vice verſa.*

6. *Of an Executor de ſon tort.*

7. *Of an Executor's Liability to be ſued for a Legacy.*

1. *Of an Executor's and Adminiſtrator's Right to the Debts and Contracts of the Teſtator or Inteſtate: and of Actions by them in reſpect thereof.*

An executor, or adminiſtrator, repreſents the perſon of his teſtator or inteſtate as to all his *perſonal contracts*; and therefore may regularly maintain any action for the breach thereof which the teſtator or inteſtate himſelf might have done, if living (*a*).

So if money be payable to *B.* without naming his executor, yet his executor or adminiſtrator, ſhall have an action for it (*b*).

So, if money be payable to *A.* or his aſſignees, his executor ſhall take it; for he is aſſignee in law (*c*).

So, if a man having 1000*l.* of *B*'s money, agrees that ſo long as he has the money in his hands he will pay 100*l.* annually to *B.*, his executor ſhall have an action for it, for it appears, that it was intended for the intereſt of the 1000*l.* which the executor ſhall have (*d*).

So, if money is awarded to *B.* and that he ſhall releaſe; the executor of *B.* ſhall have the money, and make the releaſe, though his teſtator died before the day of payment (*e*).

Where a perſon who has no right to adminiſter to an inteſtate, obtains letters of adminiſtration to him, and ſells his property, if his adminiſtration is repealed, and a freſh one granted to the perſon legally intitled to adminiſter, the latter may recover from the former the money for which he ſold the inteſtate's property in an *indebitatus aſſumpſit* for money had and received (*f*).

So, in the caſe of *Jacob* v. *Allen* (*g*), which was an action of *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe. Upon the trial, the facts proved were as follow: *H.* having letters of adminiſtration, appointed the defendant by letter of attorney to receive money owing to the inteſtate, who accordingly received the ſame, and paid it to the adminiſtrator; afterwards a

(*a*) *Co. Lit.* 209. *a. Bac. Ab. tit.* Executors and Adminiſtrators, N.
(*b*) *Com. Dig. tit.* Adminiſtration, B. 11. *Co. Lit.* 209.
(*c*) *Hob.* 9. (*d*) 1 *Rol. Ab.* 913. *l.* 15. *Sty.* 140. *But ſuch a contract would now be conſidered as uſurious. See the Stat.* 12 *Ann. c.* 16 *Com. Dig. tit* Uſury A. (*e*) 2 *Ventr.* 249. 1 *Leo.* 316.
(*f*) Lamine v. Dorrel, 2 *Ld. Ray.* 1216. (*g*) 1 *Salk.* 27.

will

will appearing, the letters of adminiſtration were called in, and repealed by citation, and the executor brought an *indebitatus aſſumpſit* againſt the defendant for money had and received to the uſe of the plaintiff. To this action two objections were made, 1ſt, that the defendant acting only as attorney for him that was in fact adminiſtrator, it was the receipt of the adminiſtrator, and not of the defendant; 2dly, that it ought to be a *ſpecial aſſumpſit*, and not a *general indebitatus*; for the money being received by ſpecial authority, and that expreſsly to the uſe of another, this expreſs intent ſuſpends and hinders the operation of law, and the raiſing of an *implied contract* to a third perſon: *Sed non allocatur*; "for the adminiſtration was merely void, and conſequently the adminiſtrator could give no authority, and ſo the attorney acted without authority; and then there is nothing to hinder the raiſing an *implied contract*, and charging the defendant by *indebitatus aſſumpſit* to the executor." Judgment was accordingly given for the plaintiff.

But in the caſe of *Pond* v. *Underwood* (*b*), which was alſo an *indebitatus aſſumpſit* brought by the plaintiff *Emanuel Pond* as executor of *Charles Pond*, deceaſed, for money received by the defendant owing to the teſtator for wages (he being a ſeaman) after the teſtator's death. On the trial it appeared in evidence, that before the will was found, adminiſtration, &c. was granted to *Anne Pond* a ſiſter of *Charles Pond*, and that ſhe made a warrant of attorney to the defendant to receive this money, being 21*l.* by virtue of which warrant he did receive it, and paid it to *Anne* before any notice given of this will. And by the direction of the Lord Chief Juſtice *Holt*, before whom the cauſe was tried, the plaintiff was nonſuited: for his Lordſhip ſaid, "though all acts done by an adminiſtrator where there is a will, are void, and ſuch an action in this caſe would lie againſt *Anne Pond*; yet it is hard to make the defendant liable, he having paid the money over to the adminiſtrator, before he knew of the will."

So, payment of money to an executor who has obtained probate of a forged will, is a diſcharge to the debtor of the inteſtate, notwithſtanding the probate be afterwards declared null and void,

(*b*) 2 *Lord Ray.* 1210. *See alſo* 4 *Bur.* 1986. *where Lord* Mansfield *expreſſed his aſſent to this caſe, and his diſapprobation to the preceding caſe of* Jacob v. Allen.

and

and adminiſtration be granted to the inteſtate's next of kin. A probate, as long as it remains unrepealed, cannot be impeached in the temporal courts.

Thus, in the caſe of *Allen*, adminiſtrator of *Thomas Prieſtman*, otherwiſe *Handy*, v. *Dundas* (*i*), which was an action for money had and received to the uſe of the inteſtate as adminiſtrator. And on the trial, a ſpecial verdict was found, ſtating in ſubſtance as follows: The defendant as treaſurer of the navy, was indebted to the inteſtate in his lifetime in 58*l.* 13*s.* 6*d.* for money had and received to his uſe. *Prieſtman* died on the 2d of *June* 1784: on the 13th of *Auguſt* 1785, one *Robert Brown* proved in the *Prerogative Court of the Archbiſhop of Canterbury*, a *forged paper writing*, dated the 18th of *May* 1784, *purporting to be the laſt will of Prieſtman otherwiſe Handy*; whereby he was ſuppoſed to have appointed *Brown* the ſole executor thereof; and *a probate of that ſuppoſed will iſſued in due form of law, under the ſeal of that court* on the ſame day in favour of *Brown*. The defendant not knowing the will to have been forged, and believing *Brown* to be the rightful executor, on *Brown*'s requeſt paid him 58*l.* 13*s.* 6*d.* being the whole balance then due from the defendant to *Prieſtman*. On the 21ſt of *July* 1787, *Brown* was called by citation, at the ſuit of *John Prieſtman* the father, and next of kin of the deceaſed, in the *Prerogative court of the Archbiſhop of Canterbury*, touching the validity of ſuch ſuppoſed will; and ſuch proceedings were thereupon had in that court, that the will and probate were declared null and void; that *Thomas Prieſtman* died inteſtate; and that *John Prieſtman* the father was his next of kin. And on the 31ſt of *March* 1788, letters of adminiſtration of the goods, &c. of *Thomas Prieſtman* were granted by that court in due form of law to the plaintiff, as attorney of *John Prieſtman*.

The Court determined that the payment was protected by the probate; and accordingly gave judgment for the defendant.

Aſhhurſt Juſtice ſaid: "I am of opinion that the plaintiff has no right to call on the defendant to pay this money a ſecond time, which was paid to a perſon who had at that time a legal authority to receive it. It is admitted that if he had made this payment under the coercion of a ſuit in a court of law, he would have been protected againſt any other demand for it; but I think that makes no difference. For as the party to whom the payment was

(*i*) 3 *Term Rep.* 125.

made

made had ſuch authority as could not be queſtioned at the time, and ſuch as a court of law, would have been bound to enforce, the defendant was not obliged to wait for a ſuit, when he knew that no defence could be made to it; this therefore cannot be called a voluntary payment. This is different from payments under forged bonds or bills of exchange; for there the party is to exerciſe his own judgment, and acts at his peril: a payment in ſuch a caſe is a voluntary act, though perhaps the party is not guilty of any negligence in point of fact. But here the defendant acted under the authority of a court of law; every perſon is bound to pay deference to a judicial act of a court having competent juriſdiction. Here the ſpiritual court had juriſdiction over the ſubject matter; and every perſon was bound to give credit to the probate till it was vacated. The caſe of a probate of a ſuppoſed will during the life of the party may be diſtinguiſhed from the preſent; becauſe during his life the *Eccleſiaſtical Court* has no juriſdiction, nor can they inquire who is his repreſentative; but when the party is dead, it is within their juriſdiction. Beſides, the diſtinction taken by the defendant's counſel between caſes where a will is ſet aſide on an appeal, or on a citation, ſeems to have ſome foundation: in the former, the original ſentence is as if it had never exiſted; in the latter the will is only repealed, and all acts under it till the repeal are good. But the foundation of my opinion is, that every perſon is bound by the judicial acts of a court having competent authority: and during the exiſtence of ſuch judicial act, the law will protect every perſon obeying it."

Where there are ſeveral executors or adminiſtrators, they have a joint and entire intereſt in all contracts of the teſtator or inteſtate; and therefore they muſt all join in an action thereon; although ſome may have omitted to prove the will, or have even refuſed before the ordinary (*k*).

But where ſeveral are named, and one only proves the will and acts, it is ſaid (*l*), that one may ſue alone, *after* the others have renounced.

In an action by an executor, or adminiſtrator upon a contract made with the teſtator, or inteſtate, the plaintiff muſt be

(*k*) *Com. Dig. tit.* Pleader 2 D. 1. *Toller's Executor*, 446, 2*d Edit.*
(*l*) *Per* Buller *Juſt.* 4 *Term Rep.* 565. *See alſo Toller's Executor*, 446.

deſcribed

deſcribed in his repreſentative character of executor or adminiſtator (*m*).

But for money due to the teſtator in his life time, but received after his death, the executor may declare either in his own right, or as executor. And in an action for the recovery thereof the defendant cannot ſet off a debt due to him from the teſtator.

Thus, in the caſe of *Miliſent Shipman* v. *A. Thompſon* (*n*), which came before the Court of *Common Pleas* on a caſe reſerved at the trial before Mr. Baron *Forteſcue* which ſtated "that the plaintiff's late huſband by his will made the plaintiff and Dr. *Morgan* (ſince deceaſed) his executors. In his lifetime, he had appointed the defendant his ſteward by letter of attorney, who after the teſtator's death received of ſeveral tenants ſeveral ſums of money due to the teſtator in his lifetime. The plaintiff brought this action in her own name, not naming herſelf executrix, for the money ſo received. The defendant gave a notice of ſet off, for ſeveral ſums due from the teſtator to him, which the judge would not permit the defendant to ſet off.

The queſtions reſerved were; 1ſt. whether the plaintiff ſhould not have declared as executrix; 2dly, whether the defendant ought not to have been permitted to ſet off the money due to him from the teſtator.

The Court, after argument, gave judgment for the plaintiff on both points. And *Forteſcue*, Baron, ſaid, "The true diſtinction I think, is this, that where the thing ſued for is aſſets in the hands of the executor or adminiſtrator before the recovery, or where the cauſe of action ariſes in the executor's own time, and never did ariſe to the teſtator, there the executor may bring the action either in his own name or as executor. And this is laid down as law in the caſe of *Jenkins* and wife v. *Plombe*, *Salk.* 207., but better and more fully reported in 6 *Mod.* 92, 181. That was an action brought by the huſband and wife as executrix upon an *indebitatus aſſumpſit* for money had and received by the defendant to their uſe as executrix: it is true that the judgment of the court was only that upon being nonſuit the plaintiffs ought to pay coſts: but the reaſon of the judgment was becauſe they might have

(*m*) *Com. Dig. tit.* Pleader. 2 D. 1.

(*n*) *Willes Rep.* 103. *See alſo* Smith v. Barrow, 2 *Term Rep.* 477. Per Aſhhurſt *Juſt. S. P.*

6 brought

brought the action in their own name, and not as executrix; for wherever an executor may have the action in his own name he ſhall pay coſts. And the caſe of *Eaves* v. *Mocato*, *Salk.* 314. was cited there, and this difference taken, that there were ſeveral counts by a plaintiff as executor, one whereof was an *inſimul computaſſet*, and being nonſuited he paid no coſts, becauſe there was no new cauſe of action, but a new action aſcertaining the ancient cauſe, which is ſtill a debt of the teſtator's. And in the caſe of *Jenkins* v. *Plomer*, as appears from *Salkeld*, this diſtinction of *inſimul computaſſet* is alſo taken; and it was ſaid, that if the defendant received this money by the appointment of the plaintiff, it was aſſets immediately, if without his conſent, yet the bringing of the action is ſuch a conſent that upon judgment it ſhall be aſſets immediately before execution, which otherwiſe it would not be until after execution; and the reaſon is becauſe it is recovered againſt a perſon who never was indebted to the teſtator, and the original debt was diſcharged.

"To apply this to the preſent caſe; here is money received by the defendant ſince the teſtator's death, and therefore it could not be received to the uſe of the teſtator, but muſt be received to the uſe of the executor. The executor has conſented by bringing the action, and the money is aſſets immediately upon the judgment. It is quite a new debt created from the defendant to the executor ſince the death of the teſtator, and a new cauſe of action which was not ſubſiſting before. The defendant was never indebted to the teſtator for this money, and the original debtors, the tenants are diſcharged. No doubt had the action been brought againſt the tenants, it muſt have been brought againſt them by the plaintiff as executrix, becauſe it was a debt as to them ſubſiſting in the teſtator's lifetime, and no new cauſe of action ariſing to the executrix.

"As to the ſet off; we cannot conſider the convenience or the inconvenience on one ſide or the other, but muſt go according to the act; for the ſtatute 2 *Geo.* 2. *c.* 22. *ſ.* 13. ſays, if either party ſues or is ſued as executor or adminiſtrator, where there are mutual debts between the teſtator or inteſtate and either party, one debt may be ſet againſt the other; ſo that it is confined by the ſtatute expreſsly to caſes where the ſuit is as executor or adminiſtrator. And therefore in the preſent caſe, the ſuit not being as executor, I think it is not within the ſtatute, and that the debts due from the teſtator to the defendant cannot be ſet off againſt this

this plaintiff in an action brought by her in her own name and not as executor. And ſuppoſing this to be ſo, it was urged as one reaſon why the action here ought to have been brought by the plaintiff as executrix: but this ſtatute will not alter the law as to that point from what it was before; and if the ſtatute has not remedied all the inconveniences, we muſt take it as it is, and cannot (I think) extend it farther. So the poſtea muſt be delivered to the plaintiff, and ſhe muſt have her judgment."

2. *Of an Executor's or Adminiſtrators' Liability to be ſued on Contracts made by the Teſtator or Inteſtate.*

An executor or adminiſtrator is anſwerable for the contracts and agreements of his teſtator and inteſtate, as far as he has aſſets, though he be not expreſsly mentioned therein (*o*).

As if goods be ſold and delivered to *A.* who dies, not having paid for them, and leaves *B.* his executor, the vendor may maintain an action of *aſſumpſit* againſt the executor for the amount of the goods ſo ſold (*p*).

So, it hath been reſolved, that there is no difference between a promiſe to pay a debt certain, and a promiſe to do a collateral act, which is uncertain, and reſts only in damages; for wherever the teſtator himſelf would have been liable to an action, his executor or adminiſtrator ſhall be liable alſo; except, indeed, upon ſuch contracts or agreements which require ſomething to be performed by the teſtator *in perſon*, becauſe in ſuch caſe the executor cannot perform it (*q*).

If therefore a man promiſes another, that in conſideration that he will marry his daughter, to give him as much as he hath given or ſhould give with any of his other daughters, if after he gives ſuch a ſum with another of his daughters and dies, an action upon this *aſſumpſit* lies againſt the adminiſtrator, notwithſtanding it be collateral (*r*).

So, if *A.* buys goods of *B.*, and becauſe *B.* diſtruſts the payment of *A.*, *J. S.* promiſes that if *A.* does not pay him at ſuch a day, he himſelf will pay it; *J. S.* dies, and the money is not paid at

(*o*) *Bac. Ab. tit.* Executors and Adminiſtrators, P. *Comp.* 375.
(*p*) *Pl. Com.* 182. 1 *Sid.* 14. 1 *Keb.* 385. *Lev.* 200, 201.
(*q*) *Cro. Jac.* 404. 417. 571. *Jon.* 16. *Palm.* 329. *Cro. Jac* 662. 1 *Rol. Rep.* 266, 433. 3 *Buſ.* 235. (*r*) 1 *Rol. Abr.* 14. *pl.* 3.

the

the day, the executors of J. S. may be charged in an action upon this promise, though it be collateral. (*s*)

So, in an action upon the caſe (*t*) againſt an executor, if the plaintiff declare, that whereas he had ſued an action againſt *B.* the defendant's teſtator, whereupon *B.*, in conſideration that the plaintiff would forbear to proſecute the ſaid writ further againſt him, promiſed to pay 50*l.* to the plaintiff; the action lies againſt the executor upon this promiſe, becauſe ſuch promiſe is not collateral, for that an action of *debt* would have lain againſt the teſtator upon this promiſe.

So, in caſe againſt an executor, (*u*) the declaration was of a promiſe by teſtator to deliver certain goods in his poſſeſſion to the plaintiff upon requeſt. It was objected that, the teſtator's promiſe was, that himſelf would deliver the goods, and not that his executor ſhould, and that he would do it on requeſt; but no requeſt appears to have been made to the teſtator. But *per Roll.* Ch. J. an executor may be charged on a collateral promiſe, if there was a breach of it in the teſtator's lifetime, and the requeſt here is good and goes to all.

3. *Of an Executor's Liability for Funeral Expences.*

An executor is not liable to pay for funeral expences, unleſs he perſonally contracts with the undertaker; becauſe this is a charge which would make him liable *de bonis proprijs.* (*x*) *Sacus, if he expect to give credit & have aſſets, 3 Camp. 295.*

4. *Of a Promiſe by an Executor to pay the Debt, &c. of his Teſtator.*

If an executor or adminiſtrator for a good conſideration promiſe to pay the debt of his teſtator or inteſtate, he is liable *de bonis propriis.* (*y*)

Thus, (*z*) if *A.* (to whom the teſtator was indebted) comes to the executor, and ſays that he intends to ſue him for the debt;

(*s*) 1 *Rol. abr.* 14. *pl.* 6. (*t*) *Ibid pl.* 7. *Hob.* 216.
(*u*) *Sty.* 158. (*x*) *Holt.* 309.
(*y*) In what caſes the promiſe of an executor to pay the debt of his teſtator muſt be in writing by virtue of the ſtatute of frauds. Vide ante *Vol.* 1. *Part I. ch.* 4. *ſ.* 1.
(*z*) 1 *Rol. abr.* 24. *pl.* 33. 9 *Co.* 94. 1 *Dan. abr.* 53. *But ſee* 2 *Bulſtr.* 278. 3 *Leon* 67. 1 *Vent.* 152.

upon which the executor promiſes in conſideration that the plaintiff will forbear him for a reaſonable time he will pay him, and *A.* forbears to ſue him for a reaſonable time; this is a good conſideration to charge the executor in an action upon the caſe, *out of his own eſtate* without aſſets; for by this promiſe it is intended as well to forbear to ſue the executor, as to forbear the debt, and a forbearance of ſuit is a good conſideration without aſſets at the time of the promiſe.

So, if a man makes a contract with *J. S.* and dies inteſtate, and his adminiſtrator, in conſideration of forbearance, &c. promiſes to pay, &c. this is a good conſideration, though the adminiſtrator was not chargeable upon this contract at common law, for he was chargeable in conſcience. (*a*)

So, where a ſurety paid a ſum of money for his principal, and after the death of the principal his executor promiſed the ſurety, that if he would forbear to ſue for ſuch a time, he would pay the money. It was moved in arreſt of judgment, that this conſideration was void: but *per Curiam*, the action well lies againſt the executor, becauſe he was liable in equity. (*b*)

So, where a perſon being executor, in conſideration the plaintiff would account with him, promiſed to pay the plaintiff what ſhould be found owing to him from the teſtator: it is ſaid, (*c*) that this was held a good conſideration, though the executor had no aſſets becauſe there was an act done, viz. accounting at the executor's requeſt.

But in the caſe of *Secar* v. *Atkinſon* adminiſtratrix of *Atkinſon*, (*d*) which was an action of *aſſumpſit*; and the declaration conſiſted of four counts. The firſt for goods ſold and delivered to the inteſtate; ſecond, *quantum valebant*; third, money paid to the uſe of the inteſtate; fourth, *that the plaintiff accounted with the defendant as adminiſtratrix, as aforeſaid, of and concerning divers ſums of money, &c. owing from the inteſtate to the plaintiff*, and upon that account the inteſtate was found in arrear and indebted to the plaintiff, &c. and being ſo found in arrear and indebted ſhe, the

(*a*) 1 *Rol. abr.* 28 *pl.* 56. *Mo.* 702. *Pl.* 977. *Cro. Jac.* 47. *Yelv.* 55. *But ſee Cro. Eliz.* 504. For more concerning promiſes by executors in conſideration of forbearance, vide Poſt *Vol.* 2. *Part III. chap.* 14.

(*b*) Scott v. Stevens. *Sid.* 89 *Lev.* 71.

(*c*) Vide Hawes v. Smith 2 *Lev.* 122. 1 *Ventr.* 268. *S. C.* *See alſo* Freeman 464. *pl.* 635. 3 *Keb.* 336, 417. *Het.* 8. 11. *Cro. Car.* 70. Sed vide next caſe.

(*d*) 1 *H. Bl.* 102.

ſaid *defendant as adminiſtratrix as aforeſaid, in conſideration thereof promiſed, &c.*

To this declaration it was objected that there was a miſjoinder of action; for that the judgment on the three firſt counts, would be *de bonis teſtatoris*, and on the latter, *de bonis propriis*, becauſe in the laſt count the defendant is charged in her own right. And in ſupport of this objection was cited the caſe of *Hawes* v. *Smith*. But the court overruled the objection; and *Heath*, J. delivered the opinion of the court as follows: "This is an action brought againſt an adminiſtratrix for a debt due from the inteſtate. And unqueſtionably, if the judgment were to be, as it has been contended, in one inſtance *de bonis teſtatoris*, and in the other, *de bonis propriis*, the declaration would be bad, but we are of opinion, that the objection is not founded in truth, and that the defendant is charged as adminiſtratrix on all the counts. The authority which was chiefly relied on, was an anonymous caſe, in *Ventris*, more correctly reported in 2 *Levinz*, by the name of *Hawes* v. *Smith*, which was a writ of error, on an action in this court againſt an executor, in which the plaintiff declared on an account ſtated at the requeſt of the defendant: the judgment was for the plaintiff, *de bonis propriis*; and on error brought, this judgment was affirmed in the *King's Bench*, it being holden not to be error, becauſe the plaintiff was not bound to account with the executor, and yet did account at the requeſt of the executor; therefore a good conſideration was raiſed. But it is very difficult to reconcile that caſe with any true principle of law. The plaintiff was bound in equity and conſcience to account, the defendant might have had a writ of account againſt him, by the ſtatute of 31 *Ed.* 3. as appears from Lord *Coke*'s commentary on the ſtatute of Weſtminſter the ſecond. It is alſo ſaid in the caſe of *Hawes* v. *Smith*, that the promiſe was in conſideration of forbearance to ſue; but ſo far is it from being like forbearance to ſue, that the defendant deſires to account, and facilitates the bringing a ſuit, by aſcertaining the ſum due. It was alſo ſaid that the plaintiff did not account at the requeſt of the defendant, and ſo there was no conſideration for the promiſe; but it is expreſsly ſtated that they accounted together, and that the defendant promiſed as adminiſtratrix. This is the common mode of declaring againſt executors and adminiſtrators, to ſave the ſtatute of limitations; but if it were to be conſidered as making them perſonally liable, I do not know who would ever take out adminiſtration."

So, if an executor without any conſideration, promiſes to pay the debt of his teſtator, when he has no aſſets, ſuch promiſe is *nudum pactum, ex quo non oritur actio.*

Thus in the caſe of *Rann* and another, executors of *Mary Hughes* v. *Iſabella Hughes* adminiſtratrix of *John Hughes* in error: (*e*) The declaration ſtated that on the 11th of *June* 1764 divers diſputes had ariſen between the plaintiff's teſtator, and the defendant's inteſtate which they referred to arbitration; that the arbitrator awarded that the defendant's inteſtate, ſhould pay to the plaintiff's teſtator 839*l.* That the defendant's inteſtate afterwards died poſſeſſed of effects ſufficient to pay that ſum; that adminiſtration was granted to the defendant; that *Mary Hughes* died, having appointed the plaintiffs her executors; that at the time of her death the ſaid ſum of 983*l.* was unpaid, "by reaſon of which premiſes the defendant as adminiſtratrix became liable to pay to the plaintiffs as executors the ſaid ſum, and being ſo liable, ſhe in conſideration thereof undertook and promiſed to pay," &c. On this declaration a verdict was found for the plaintiff, and a general judgment was entered in the *King's Bench* againſt the defendant *de bonis propriis.* This judgment, however, was reverſed in the *Exchequer Chamber*; and a writ of error was afterwards brought in the *Houſe of Lords*; where after argument the following queſtion was propoſed to the Judges by the Lord Chancellor, "Whether ſufficient matter appeared upon the declaration to warrant after verdict the judgment againſt the defendant in error *in her perſonal capacity;*" upon which the Lord Chief Baron *Skynner*, delivered the opinion of the Judges to this effect.—It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country ſupplies no means nor affords any remedy, to compel the performance of an agreement made without ſufficient conſideration; ſuch agreement is *nudum pactum ex quo non oritur actio;* and whatſoever may be the ſenſe of this maxim in the civil law, it is in the laſt mentioned ſenſe only that it is to be underſtood in our law. The declaration ſtates that the defendant being indebted as adminiſtratrix promiſed to pay when requeſted, and the judgment is againſt the defendant generally. The being indebted is of itſelf a ſufficient conſideration to ground a promiſe, but the promiſe muſt be co-extenſive with the conſideration unleſs ſome particular conſideration of fact can be found here to warrant the extenſion of it againſt the de-

(*e*) 7 *Term Rep.* 350. *n. a. See alſo* 3 *Lev.* 67.

fendant

fendant in *her own capacity*. If a perſon indebted in one right in conſideration of forbearance for a particular time promiſe to pay in another right, this convenience will be ſufficient conſideration to warrant an action againſt him or her in the latter right: but here no ſufficient conſideration occurs to ſupport this demand againſt her in her perſonal capacity; for ſhe derives no advantage or convenience from the promiſe here made. For if I promiſe generally to pay upon requeſt what I was liable to pay upon requeſt in another right, I derive no advantage or convenience from this promiſe, and therefore there is not ſufficient conſideration for it. But it is ſaid that if this promiſe is in writing, that takes away the neceſſity of a conſideration and obviates the objection of *nudum pactum* for that cannot be where the promiſe is put in writing; and that after verdict, if it were neceſſary to ſupport the promiſe that it ſhould be in writing, it will after verdict be preſumed that it was in writing: and this laſt is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none ſuch in the law of *England*. His lordſhip concluded by ſaying, "that all his brothers concurred with him, that in this caſe there was not a ſufficient conſideration to ſupport this demand as a *perſonal* demand againſt the defendant, and that its being now ſuppoſed to have been in writing makes no difference. The conſequence of which is that the queſtion put to us muſt be anſwered in the negative."

The Houſe of Lords affirmed the judgment of the *Exchequer Chamber*.

So, if *B.* as adminiſtrator to *J. D.* is indebted to *A.* in 20*l.* and upon this *B.* in conſideration that adminiſtration is granted to him and that he has aſſets in his hands, aſſumes and promiſes to pay the debt *tam cito* as any debt due to the inteſtate comes to his hands to the value of the debt, and after ſuch a debt comes to his hands, yet no action lies upon this promiſe, for here is no conſideration to maintain this action by which the adminiſtrator ſhould be charged out of his own eſtate, for here the conſideration is not to forbear to ſue, or any other conſideration. (*f*)

So, in the caſe of *Forth* and others v. *Stanton*, (*g*) which was an action of *aſſumpſit*, wherein the plaintiffs declared that one *Robert Stanton*, the late huſband of the defendant, was indebted to *John Neve* and *Timothy Aſſopp* in 100*l.* for beer ſold by them to him, and being ſo indebted, the ſaid *Robert Stanton* died; after whoſe death

(*f*) 1 *Rol. abr.* 24 *pl.* 32, *and ſee* 1 *Dan.* 52. (*g*) 1 *Saund.* 210.

the defendant took into her hands, goods, and chattels of the ſaid *Robert Stanton*, of the value of 100*l.* and adminiſtered thoſe goods and chattels, as executor of the will of the ſaid *Robert*, and that afterwards the defendant had paid 40*l.* parcel of the ſaid 100*l.* to the ſaid *Neve* and *Alſopp*. And whereas the ſaid *Neve* and *Alſopp* afterwards had aſſigned to and appointed the plaintiffs to receive of the defendant 60*l.* reſidue of the ſaid 100*l.* to the uſe of the plaintiffs, whereof the defendant had notice given to her: whereupon the defendant, in conſideration that the plaintiffs, at the ſpecial inſtance and requeſt of the defendant would accept the defendant to be their debtor for the ſaid 60*l.* undertook and promiſed the plaintiffs to pay them the ſaid 60*l.* And the plaintiffs aver that they had accepted the ſaid defendant to be their debtor. And they alſo declared upon an *inſimul computaſſet* for 60*l.* more.

It was objected that the declaration was inſufficient, becauſe there is no good conſideration to found the promiſe; and it was argued that the defendant before the promiſe did not owe any thing to the plaintiffs, but to *Neve* and *Alſopp*: and by their aſſignment, they did not transfer any property or intereſt in the debt, being a *choſe in action*, but only gave an authority to the plaintiffs to receive it, if the defendant would pay it. But if the defendant would not pay it, the plaintiffs could bring any action againſt her, but *Neve* and *Alſopp* muſt have ſued for it. It is true, indeed, that if the defendant had paid the 60*l.* to the plaintiffs, ſhe would be diſcharged againſt the ſaid *Neve* and *Alſopp*; but in this caſe the defendant refuſed to pay; therefore *Neve* and *Alſopp* ought to bring the action againſt her, and not the plaintiffs, who have not any intereſt in the debt. And this caſe is no more, than if I promiſe a ſtranger, to whom I do not owe any thing, that if he will accept me to be his debtor for 60*l.* I will pay it to him, yet this is but a *nudum pactum*, becauſe I was not indebted to him before. And my promiſe to pay, if the other will receive it is nothing but a mere voluntary promiſe, which does not bind me at all. And in the preſent caſe, if the promiſe ſhould be good, the defendant would be charged *de bonis propriis*, where ſhe was chargeable to *Neve* and *Alſopp* only *de bonis teſtatoris*; and yet here is no conſideration at all ſo to charge her: and of this opinion was the whole court. And judgment was given for the defendant.

So, in the caſe of *Parker* v. *Baylis* and *wife*, (*b*) which was an

(*b*) 2 *Boſ. & Pul.* 73.

action

action of *aſſumpſit*, wherein the plaintiff declared againſt *Wm. Baylis* and *Mary* his wife, the latter being adminiſtratrix of *Eliz. Stattard* deceaſed: for that whereas *Eliz. Stattard* died inteſtate poſſeſſed of South Sea ſtock which ſhe held in truſt for the plaintiff, and upon which certain dividends were due, in conſideration that the plaintiff at his own expence would procure adminiſtration to be granted to *Mary Baylis* as the next of kin to *Eliz. Stattard*, and would furniſh evidence to enable the defendants to receive the dividends, the ſaid *William Baylis* and *Mary* his wife ſhe being adminiſtratrix, as aforeſaid, promiſed to pay over to the plaintiff the amount of the dividends when received.

The court held, that the conſideration ſtated was inſufficient to ſupport the promiſe, and that the dividends never made part of the intеſtate's eſtate.

Lord *Eldon*, Ch. J. ſaid, "The facts of this caſe are, that the plaintiff being entitled to a certain ſum of 3 *per cent. South Sea* annuities ſtanding in the name of *Elizabeth Stattard*, and alſo to the dividends which had accrued during her life, was deſirous of obtaining poſſeſſion of them through the medium of an adminiſtration. The conſideration for the promiſe ſtated in the declaration is, that the plaintiff undertook to procure adminiſtration to *Mary Baylis* as next of kin, at his own expence, and alſo to procure evidence by which ſhe ſhould be enabled to receive the dividends. But this affords no conſideration for the promiſe. Though *Mary Baylis* was next of kin, it does not appear that ſhe was to derive any peculiar benefit from taking out adminiſtration, and if the plaintiff was deſirous of placing ſome perſon between himſelf and the *South Sea Company* it is very obvious that he ought to pay all the expences attending that tranſaction. Whatever dividends had been received by the intеſtate in her life-time were part of the general funds; and with reſpect to them the plaintiff is entitled to demand payment out of the aſſets, either as a ſpecialty or ſimple contract creditor, according as he may be poſſeſſed of ſecurity or not. But the preſent action ſeeks a judgment *de bonis inteſtati*, on the receipt of a ſum of money by the defendants after the death of the intеſtate. The queſtion is, whether *Mary Baylis*, who appears on this record rather in the character of truſtee than in any other character, (for the ſtock is not aſſets,) has ſo much relation to the intеſtate that her perſonal act of receiving this money though as a truſtee, ſhall give a general remedy to the *ceſtuy que truſt* againſt all the aſſets of the intеſtate in common

with the ſimple contract and ſpecialty creditors? Not doubting that the plaintiff has abundance of remedies, I am of opinion that he is not entitled to charge the aſſets of the inteſtate with a demand founded on the receipt of that which never was a part of the inteſtate's eſtate."

Heath, J. alſo ſaid, "It ſeems admitted, that judgment muſt be given *de bonis inteſtati* in this caſe in the firſt inſtance. But there has been no default on the part of the inteſtate. The receipt of dividends after the death of the inteſtate is the cauſe of action; and the promiſe of *Mary Baylis* is in conſequence of that receipt. This promiſe will not bind her huſband. And as the money never was aſſets for payment of debts, nonpayment in this caſe cannot bind the eſtate of the deceaſed."

So, a ſubmiſſion to arbitration by an adminiſtrator is not an admiſſion of aſſets; and if a ſum of money is awarded to be due from the inteſtate, without ſaying by whom it ſhall be paid, the adminiſtrator is not *perſonally* liable *de bonis propriis*, but only *de bonis teſtatoris*. (*i*)

So, a power of attorney given by an executrix to act for her as executrix, does not authoriſe the accepting of bills of exchange to charge her in her own right, for debts due from her teſtator.

Thus, in the caſe of *Gardner* v. *Baillie*, (*k*) which was an action of *aſſumpſit* on a bill of exchange, drawn by the plaintiff on the 4th of *September* 1793, for 793*l.* 7*s.* 9*d.* on the defendant, by the name and deſcription of *Mrs. C. Baillie executrix of J. B., accepted by E. Thornton for, and on behalf of the defendant*, it being averred that *Thornton* was duly authoriſed to accept the ſame on the defendant's account. At the trial before Lord *Kenyon*, Ch. J. it was proved, on behalf of the plaintiff, that *Thornton*, who acted under a letter of attorney from the defendant accepted the bill in queſtion, which was drawn and accepted for a debt due to the plaintiff from the defendant's teſtator, and evidence was offered to prove that the defendant had paid other bills drawn on her by other creditors of *J. Baillie*, and accepted on her account by *Thornton*, who on thoſe occaſions alſo acted under this power of attorney; but Lord *Kenyon* thought the evidence inadmiſſible. A verdict however was taken for the plaintiff, for the amount of the bill, with liberty for the

(*i*) Pearſon *v.* Henry, 5 *Term Rep.* 6. Sed vide Barry *v.* Ruſh, poſt 538. (*k*) 6 *Term Rep.* 591.

defendant

defendant to move to set it aside and to enter up a nonsuit, if the court of *King's Bench* should be of opinion that the plaintiff ought not to recover.

The principal question in the cause was, whether *Thornton* had power under this letter of attorney to accept bills of exchange for the defendant; because, if he had, the verdict was right. By the letter, after reciting that the defendant had been appointed executrix of *J. Baillie* who was entitled to considerable sums of money on mortgage, bonds, bills, notes, unsettled accounts, &c. the defendant appointed *Thornton* her attorney, as executrix, *to ask, demand, sue for and receive all sums*, &c. "which at the time of *J. B.*'s death were due to him and which were then due to her as executrix;" *in her name as executrix, to adjust and settle all accounts, differences, &c. wherein she, as executrix, was interested;* to submit the same to arbitration (if necessary,) and *for that purpose in her name as executrix to execute any bond*, &c. to execute for her and in her name, as executrix, assignments of mortgages, receipts, releases, &c. for her, and in her name, as executrix, and agreeably to the due course and order of law to pay all debts, &c. due from her as executrix, whether on mortgage, bond, bill, note, or otherwise; and generally for her, as executrix, to do all such farther acts for receiving debts and discharging the powers given by the letter of attorney; and giving full power to do and act "*touching and concerning all or any of the said premises as effectually to all intents, constructions, and purposes whatsoever, as she as executrix could, &c.*"

A motion was accordingly made to set aside the verdict and enter a nonsuit; but the counsel for the plaintiff contended that as *Thornton* was expressly authorised to receive and pay all sums due to and from the defendant, to refer any matters in dispute between her and any other person to arbitration, and generally to do all further and other lawful and reasonable acts as to him should seem proper, he had power to bind the defendant by accepting the bill in question on her account, it being for a legal debt due from her as executrix.

For the defendant it was argued that the accepting of this bill by *Thornton* was an excess of authority not warranted by the power, because it would charge her in her own right, whereas the letter of attorney only authorised *Thornton* to bind her as executrix, the letter being cautiously drawn with that view.

The court said that though they had no doubt about the case, yet as there was a similar cause (said to be) depending in the court of

of *Common Pleas* (*l*) on the conſtruction of the ſame letter of attorney, it would be proper not to decide this caſe until they had had an opportunity of conferring with the judges of that court on the ſubject.

On a ſubſequent day Lord *Kenyon* Ch J. ſaid, "there was no reaſon why the court ſhould any longer ſuſpend their judgment in this caſe, as they were all clearly of opinion that *Thornton* had no authority to bind the defendant by accepting the bill of exchange on her account, and conſequently that the action could not be maintained. That they had conſulted with the judges of the court of *Common Pleas*, who authoriſed him to ſay that they concurred in this opinion reſpecting the conſtruction of the letter of attorney, but that there were other circumſtances in that caſe." The rule for a nonſuit was made abſolute accordingly.

The caſe alluded to by the court of *King's Bench* is *Howard* v. *Baillie*, (*m*) in which it was decided, that if a perſon, acting for an executor under a power of attorney, thereby authorizing him to tranſact the affairs of the teſtator in the name of the executor, as executor, and to pay, diſcharge and ſatisfy all debts due from the teſtator, accepts a bill of exchange in the name of the executor, for the amount of a debt due to a creditor from the teſtator, and the executor afterwards admits that the bill ſo accepted is for a juſt debt, and that it ought to be paid, the executor is perſonally liable *de bonis propriis*.

So, if an executor bind himſelf by a perſonal engagement to perform an award, or if the ſubmiſſion to arbitration be a reference not only of the cauſe of action, but alſo of the queſtion whether he has or has not aſſets, and the arbitrator award the executor to pay the amount of the plaintiff's demand, it is equivalent to determining, as between the parties, that the executor had aſſets to pay the debt: and the executor is concluded by the award; although it will not operate as an admiſſion in any other ſuit: and he may be attached for nonpayment. (*n*)

5. *Of a Debtor making his Creditor Executor; et vice verſa.*

If a debtor appoint his creditor his executor, the latter is allowed to retain his debt in preference to all other creditors of an equal degree. (*o*)

(*l*) Howard *v.* Baillie, *the following caſe.*
(*m*) 2 *H. Bl.* 618. (*n*) Barry *v.* Ruſh, 1 *Term Rep* 691.
(*o*) *Wentw Off. Executors* 91. *Toller's Law of Executors, Book III. cap.* 3.

So,

So, if a debtor make his creditor and another perſon executors, and the creditor neither proves the will nor acts as executor, he may maintain an action againſt the other for his demand on the teſtator.

Thus, in the caſe of *A.* and *J. Rawlinſon* v. *Shaw* executor of *Woodhouſe*, (*p*) which was an action of *aſſumpſit*; and the eight firſt counts in the declaration were on promiſes made by the teſtator; the laſt count was on a promiſe by the defendant as executor. To the firſt eight counts the defendant pleaded that *Woodhouſe*, the teſtator, in his lifetime, (to wit,) on, &c. duly made and publiſhed his laſt will and teſtament in writing, and thereof conſtituted and appointed the defendant and *J. Rawlinſon*, and three other perſons, joint executors; and ſoon afterwards died without altering or revoking it. And as to the laſt count, that that promiſe and undertaking (if ſuch were made) was made by the defendant together with the ſaid *J. Rawlinſon*, and thoſe three perſons, and not by the defendant alone. The plaintiffs by their replication ſaid that *J. Rawlinſon* never proved the will of *Woodhouſe*, nor took upon himſelf the burthen of the execution thereof, nor in any manner whatſoever ever accepted of the ſuppoſed appointment of him the ſaid *J. Rawlinſon* to be an executor of the ſaid will, nor ever adminiſtered any goods or chattels which were of the ſaid *Woodhouſe* deceaſed at the time of his death, as executor of the laſt will and teſtament of the ſaid *Woodhouſe*. And as to the other plea they replied that the promiſe in the laſt count was not made by the defendant together with *J. Rawlinſon*, and the other three perſons as in the plea alledged.

To the replication to the firſt plea there was a general demurrer, and joinder in demurrer.

In ſupport of the demurrer it was contended that the nomination of the plaintiff as executor in the will of *Woodhouſe* the teſtator operated as a ſuſpenſion of his legal remedy, as he had not actually renounced, though not to an extinguiſhment of the debt, or even to a ſuſpenſion of his remedy in a court of Equity. If ſo, the plea is a bar to the action, and the fact diſcloſed by the replication does not vary the caſe. All the legal parties to a contract muſt by law ſue and be ſued, which is ſufficiently proved by the uſual plea in abatement where any of the parties are omitted

(*p*) 3 *Term Rep.* 557.

to

to be named; and though this rule has ſome exceptions with regard to defendants, it is univerſal as to plaintiffs. Now here, the plaintiff not having renounced, muſt in a court of law be conſidered as having all the legal qualities of executor ſtill attached to him, and therefore cannot ſue the defendant in his character of co-executor: for one executor cannot ſue his co executor, the former being ſuppoſed in contemplation of law to be equally in poſſeſſion as joint tenant of all the teſtator's aſſets, *Went. Off. of Executors* 100, out of which he may pay himſelf: and the effect of a judgment againſt an executor is rather to attach on the property of the teſtator than on the perſon of the defendant. In *Co. Litt.* 264. *b.* it is ſaid that if the obligor make his obligee his executor, this is a releaſe in law of the action. But the duty remains for which the executor may retain. *Wankford* v. *Wankford*, *Salk.* 299. *Fryer* v. *Gildridge*, *Hob.* 10. and 2 *Show.* 401, where it is added that the debt is not extinguiſhed, but only ſuperſeded, as to the executor. *Plowden* 184, 5. gives the reaſon why the action is gone, becauſe in judgment of law the plaintiff is ſatisfied before; for if the executor has as much goods in his hands as his own debt amounts to, the property in theſe goods is altered and veſted in himſelf, that is, he has them as his own goods in ſatisfaction of his debt, and not as executor. If the caſe of *Dorcheſter* v. *Webb*, *Sir W. Jones* 345. be cited on the other ſide, it is diſtinguiſhable from the preſent; for that caſe only ſhews that where the obligee had been made co-executor with another, and had renounced, the executor of the obligee might ſue the ſurviving executor. It is indeed given as a reaſon in that caſe, that when an obligor makes the obligee and another his executors, and the obligee refuſes, the debt is neither releaſed nor diſcharged, and the obligee may ſue the aſſets; but that was an *obiter dictum* not neceſſary for the deciſion of the caſe before the court: and there too it muſt be taken that he had legally renounced; and by the death of the obligee the period of ſuſpenſion had ceaſed, and the whole of the property had gone into another channel, namely into the hands of the ſurviving executor. But here the plaintiff has not legally renounced.

The counſel for the plaintiff was ſtopped by the court: and Lord *Kenyon*, Ch. J. ſaid, "It is impoſſible to entertain the leaſt doubt in this caſe. The argument is that if *A.* owe *B.* a ſum of money and chuſe to make him his executor, though *B.* will not act, his legal remedy is extinguiſhed. The propoſition is too monſtrous to

to admit of any argument. If indeed the creditor had accepted of the executorſhip, and acted, there might perhaps have been ſomething in it. But the facts diſcloſed by the replication poſitively negative that; for it is there averred, that he never proved the will, nor took upon himſelf the burthen of the execution thereof, nor in any manner whatſoever accepted of the ſuppoſed appointment to be an executor, nor ever adminiſtered, &c. And notwithſtanding this, he is now told that he cannot enforce the payment of his debt in a court of law. I ſhould have been extremely ſorry, to have found myſelf bound by authorities to accede to ſuch a poſition: and I am glad that none are found to warrant it, and that there is one direct authority againſt it. There is no pretence therefore for this demurrer; and even if it could have been ſupported, it would be diſhoneſt in the extreme."

Buller, J. ſaid: "The argument in ſupport of this demurrer is fully anſwered by the plain words of the replication. The foundation of the argument is, that this is an action in reſpect of property, and that the plaintiff has poſſeſſion of that property: but the replication pointedly ſtates that he never proved the will, nor in any manner whatever acted as executor, nor adminiſtered. Then if he has not the poſſeſſion of the property of the teſtator, he ſtands in the ſame ſituation as any other ſtranger, and may equally ſue the perſon, who has legal poſſeſſion of that property." The Court accordingly gave judgment for the plaintiff.

But if a creditor appoint his debtor executor, ſuch appointment ſhall operate as a releaſe and extinguiſhment of the debt, on the principle that a debt is merely a right to recover the amount by way of action, and as an executor cannot maintain an action againſt himſelf, his appointment by the creditor to that office diſcharges the action, and conſequently diſcharges the debt. (*q*) Thus, if the obligee of a bond make the obligor executor, this amounts to a releaſe at law of the debt: (*r*) if ſeveral obligors be bound jointly and ſeverally, and the obligee conſtitute one of them his executor it is an extinguiſhment of the debt, and the executor is incapable of ſuing the other obligors. (*s*) The debt is alſo releaſed where only one of ſeveral executors is in-

(*q*) *Vide Toller's Executor* 348. *Book* 3. *ch.* 4. *ſ.* 9. (*r*) 8 *Co.* 136.
(*s*) *Went. Off. Executors* 31. 11 *Vin. Abr.* 398.

debted

debted to the teſtator, for one executor cannot maintain an action againſt another; (*t*) and after the death of ſuch executor, the ſurviving executors cannot ſue his repreſentative for the debt. (*u*) Nor is the caſe varied by the executor's dying without having proved the will, or having adminiſtered, (*x*) or even by his refuſal to act with his co-executors, (*y*) unleſs he formally renounced the office in the ſpiritual court; ſuch a renunciation, indeed, ſhall prevent the releaſe of his debt; for he could no more be compelled to accept a releaſe than a deed of grant. (*z*)

It is obſerved (*a*) that in all theſe caſes the legal remedy is deſtroyed by the act of the party, and, therefore, is for ever gone; but the effect is different where it is ſuſpended merely by the act of law; as if adminiſtration of the effects of a creditor be committed to the debtor, this is only a temporary privation of the remedy by the legal operation of the grant: thus, if the obligor of a bond adminiſter to the obligee and die, a creditor of the obligee having obtained adminiſtration *de bonis non* may maintain an action for ſuch debt againſt the executor of the obligor.

6. *Of an Executor de ſon tort.*

If a perſon without any appointment of the teſtator aſſume the office of executor, by taking poſſeſſion of the aſſets, paying debts, or otherwiſe adminiſtering the effects; ſuch a one is ſtyled an executor *de ſon tort*, or an executor of his own wrong. (*b*)

In the ſecond reſolution in *Read*'s caſe, (*c*) it is ſaid, that if an executor is made, and proves the will; if a ſtranger takes any of the goods of the teſtator claiming them as his own, he is not executor of his own wrong; becauſe there is another executor of right, whom the creditor may charge; but although there be an executor who adminiſters, yet if the ſtranger takes the goods, and claiming to be executor, pays debts, he may for ſuch expreſs adminiſtration be charged as executor of his own wrong. And the third reſolution was, that where the defendant takes the goods be-

(*t*) *Went. Off. Executors* 31. (*u*) *Ib.* 32. *Plo. Com.* 264. *Leon.* 320.
(*x*) *Salk.* 300. *Plo. Com.* 184. *Went. Off. Executors* 31.
(*y*) *Salk.* 308. (*z*) Ibid 307. (*a*) *Toller's Executor*, 348. and ſee the caſes there cited.
(*b*) *Vide Toller's Executor, Book I. ch.* 11. *ſ.* 2. (*c*) 5 *Co.* 33. *b.*

fore

fore the rightful executor hath taken upon him or proved the will, he may be charged as executor of his own wrong.

So, if *A.* the servant of *B.* sell the goods of *C.* an intestate, as well after his death, as before, though by the orders of *C.*, and pay the money arising therefrom into the hands of *B.*: *B.* may be sued as an executor *de son tort*. But what acts make a person liable as executor *de son tort* is matter of law for the judge to decide; it is only for the jury to say, whether the acts are sufficiently proved.

Thus, in the case of *Padget*, and another v. *Priest* and *Porter*, (*d*) which was an action of *assumpsit* for goods sold and delivered against the defendants as executors of *W. Shore*. They severally pleaded, 1. the general issue; 2. that they were not executors; and, 3. that they had fully administered. At the trial before *Buller*, J. the plaintiffs proved the delivery of the goods in question to *W. Shore*, who was a publican. A few days previous to his death the intestate sent to *Porter*, his brewer, desiring him to send a man to take charge of the cellar, and to draw the beer, who sent *Payne* his servant. *Payne* sold beer as well after the intestate's death as before. The intestate likewise ordered *Payne* to sell some hogs, which he did after his death, and paid into *Porter*'s hands the produce of them, and of the beer which was sold after the death of *W. Shore*. On the 7th of *December* 1786, administration was granted to *J. Shore*, who afterwards brought actions against these defendants for money had and received. On the 3d of *February* 1787, *Priest* paid 2*l.* and on th 10th of *February*, *Porter* paid 41*l.* into court, on these actions. On the 31st of *January* the defendants pleaded in this action, which had been commenced on 23d of *December* preceding. Verdict for the plaintiffs. But a rule was obtained calling on the plaintiffs to show cause why there should not be a new trial, on the ground that there was no evidence to prove the defendants *executors de son tort*; or at most only slight evidence of facts done by them, which ought to have been left to the jury to consider with what view they had acted; and that at all events there was no evidence to affect *Priest*.

Buller, J., after reporting the above facts, said, that considering *Priest*, merely in the light of a servant, he should have been desirous of obtaining a verdict in his favour, if that could have

(*d*) 2 *Term Rep.* 97.

been

been done conſiſtently with the evidence; but in fact he had paid money into court, in another action brought againſt him by the adminiſtrator, which was deciſive againſt him.

And the court decided that the defendants had made themſelves executors *de ſon tort*; and therefore diſcharged the rule.

Aſhhurſt, J. ſaid: "It is very clear upon the evidence that the money in the hands of the defendants belonging to the inteſtate was not paid over to the rightful adminiſtrator when this action was brought; and therefore they cannot juſtify it under any plea. Though they might have excuſed themſelves by paying the money over before action brought, yet not having done ſo they have made themſelves executors *de ſon tort*."

Buller, J. alſo ſaid: "The plaintiffs, who were creditors of *W. Shore*, find *Prieſt* and *Porter* ſelling his goods, and as they had no means of knowing whether they were lawful, or wrongful executors, they looked upon them from their acts in the character of rightful executors. They therefore brought this action againſt them as executors: they proved effects of the inteſtate in their hands; that they ſold them after the inteſtate's death, and that at the time when this action was brought, and even when the defendants pleaded in this action, they had money of the inteſtate in their hands. I cannot agree with the defendant's counſel that the queſtion whether the executors *de ſon tort* or not is to be left to a jury; that is a concluſion of law; whether the defendants had effects belonging to the inteſtate or not, and whether they ſold them, were indeed queſtions to be left to a jury; but when thoſe facts are eſtabliſhed, the reſult from them is a queſtion of law; and it is clear from all the caſes, that the ſlighteſt circumſtance will make a man an executor *de ſon tort*. It is ſaid in *Dyer* 166. *b.* that if a man even milk the cows, or take a dog of the inteſtate, that will conſtitute him an executor *de ſon tort*. With reſpect to *Porter*, it clearly appears from the evidence that he meant to pay himſelf by intermeddling with the inteſtate's affairs: but as to *Prieſt*, if there had been any circumſtances in his favour I would have left it to the jury to find for him. But I could not do ſo when it appeared that at the time of the plea pleaded he had money of the inteſtate's in his hands. With regard to the rule of the wrongful acts of the ſtranger being purged by the ſubſequent aſſent of the rightful adminiſtrator, that cannot apply to the caſe of third perſons; it only applies to the acts of the adminiſtrator himſelf. If indeed previouſly

previouſly to the action brought againſt the defendants as executors *de ſon tort*, they had paid the money over to the rightful adminiſtrator, that would have been a good defence; becauſe then they would have applied the money properly. So that the courts have gone thus far, that if an action brought by a rightful adminiſtrator againſt an executor *de ſon tort*, whatever may have been diſpoſed of in the courſe of adminiſtration, as by paying debts, &c. ſhall be allowed to him in damages. But that does not apply to this caſe, where the creditors find money in the hands of the defendants at the time of bringing the action.

So, in the caſe of *Edwards* v. *Harben*, (*e*) it was determined, that if a creditor takes an abſolute bill of ſale of the goods of his debtor, but agree to leave them in his poſſeſſion for a limited time, and in the mean time the debtor die, whereupon the creditor takes and ſells the goods, he will be liable to be ſued as executor *de ſon tort* for the debts of the deceaſed; for the debtor's continuing in poſſeſſion is inconſiſtent with the deed, and fraudulent againſt creditors. It is a general rule in the transfer of chattels, that the poſſeſſion muſt accompany and follow the deed. Therefore, where the conveyance is abſolute, the poſſeſſion muſt be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in poſſeſſion till the condition be performed.

So, an executor *de ſon tort* cannot diſcharge himſelf from an action brought by a creditor by delivering over the effects to the rightful executor after the action is brought: nor can he retain for his own debt of a higher nature by conſent of the rightful executor given after the bringing of the action by the creditor.

Thus, in the caſe of *Curtis* and another v. *Vernon* executor of *Palmer*, (*f*) which was an action on the caſe on promiſes by the teſtator. The defendant pleaded that *Palmer* died inteſtate, and that the defendant was never executor, nor ever poſſeſſed any of his goods, ſave as executor of his own wrong; that after *Palmer*'s death, and before the 14th of *May* 1789, adminiſtration was granted to his widow *S. Palmer*; and that on the 15th of *May* 1789 the defendant delivered over to the adminiſtratrix all the goods, &c. belonging to the inteſtate which came to his hands. 4thly, That the defendant never was executor, &c. ſave as execu-

(*e*) 2 *Term Rep.* 587. (*f*) 3 *Term Rep.* 587.

tor of his own wrong; that adminiſtration was granted to *S. Palmer* (as before); that the defendant recovered 3000*l.* on a bond in this court in the inteſtate's lifetime; that no goods or effects of the inteſtate came into the defendant's poſſeſſion, except goods of the value of 794*l.* 13*s.* 9*d.* which are not ſufficient to ſatisfy his ſaid debts; and that the adminiſtratrix, on the 15th of *May* 1789, aſſented to his retaining thoſe goods in ſatisfaction of his debt.

To the two laſt pleas there was a general demurrer, and joinder in demurrer. And in ſupport of the demurrer, the counſel for the plaintiff argued thus, "The third plea cannot be ſupported, becauſe it appears from all the authorities on this ſubject that an executor *de ſon tort* cannot purge his tortious act after an action is brought againſt him by delivering over the goods of which he has taken poſſeſſion, to the rightful adminiſtrator; though he may diſcharge himſelf by delivering them over previous to the commencement of the action. *Keble* v. *Oſbaſton*, *Hob.* 49. *Bradbury* v. *Keynel*, *Cro. Eliz.* 565. *Salk.* 313. Anonymous. and *Padget* v. *Prieſt*, 2 *Term Rep.* 97. For in the language of one of thoſe caſes, 'having once made himſelf chargeable to the plaintiff's action, as being executor *de ſon tort* he ſhall never afterwards diſcharge himſelf by matter *ex poſt facto*.' The fourth plea is alſo bad; becauſe an executor *de ſon tort* cannot retain in ſatisfaction of his own debt; as that would not only enable him to take advantage of his own wrong, but would occaſion a contention among the creditors to take poſſeſſion of the inteſtate's effects without any authority in law. *Coulter's caſe*, 5 *Rep.* 30. Neither can he retain with the aſſent of the perſon who afterwards becomes the rightful adminiſtrator, ſince that would be attended with the ſame inconvenience."

On the other ſide it was argued in ſupport of the 3d plea, that an executor *de ſon tort* cannot be charged with more than the value of thoſe goods of the inteſtate of which he has taken poſſeſſion; and he may diſcharge himſelf from being liable even thus far by delivering over the goods to the rightful adminiſtrator. 1 *Mod.* 213. Otherwiſe an executor *de ſon tort* might be doubly charged; firſt by any creditor of the inteſtate for the value of the goods taken; and 2dly, by the adminiſtrator in trover; for the firſt recovery would be no bar to the action of the adminiſtrator. And ſuch executor is equally diſcharged by delivering over the goods to the right adminiſtrator, whether the action be or be not commenced, provided

provided the delivery be made before plea pleaded; as will appear by the reaſoning of the caſes cited on the next point. As to the fourth plea; if after action brought and before plea pleaded, the executor take out letters of adminiſtration, he may plead a retainer for his own debt; though the taking adminiſtration does not abate the writ. *Whitehead*, v. *Sampſon*, *Freem.* 265; 2 *Show.* 373; *Baker* v. *Berisford*, 1 *Sid.* 76; 2 *Ventr.* 180; *Williamſon* v. *Norwich*, *Sty.* 337; 1. *Rol. Abr.* 923. L. *pl.* 12; and *Vaughan* v. *Brown*, 2 *Str.* 1106; *Andr.* 328. If then the defendant himſelf might have retained in ſatisfaction of his own debt, in the event of letters of adminiſtration having been granted to him even after the action was brought, and this he might have done as his debt was of a higher nature than the plaintiff's, it ſeems to follow that he may alſo retain with the aſſent of the rightful adminiſtrator, and that the aſſent is ſtated in the plea.

But Lord *Kenyon* Ch. J. in delivering the opinion of the Court, ſaid, "They had looked into the authorities which were cited on the part of the defendant, but that they did not eſtabliſh the propoſitions for which they were adduced. The caſe in 1 *Sid.* 76. is reported in a confuſed manner; but it concludes with ſaying, "that an executor *de ſon tort* cannot pay himſelf." Now that goes the length of deciding the preſent caſe. And indeed the caſes cited from *Freem.* *Yelv.* *Moor*, *Mod.* and *Strange*, all prove the ſame point, that an executor *de ſon tort* cannot retain for his own debt. They alſo take the diſtinction between ſuch an executor, and an executor *de ſon tort*, afterwards legalizing his own wrong by taking out letters of adminiſtration. The caſe in *Strange* ſhows this matter very clearly, where the Court ſaid it would be extremely hard that, if a perſon entitled to adminiſtration is oppoſed in the *Eccleſiaſtical Court*, and does any act *pendente lite* to make himſelf executor *de ſon tort*, thoſe acts ſhould not be purged by his afterwards obtaining letters of adminiſtration. And they added that the granting adminiſtration legalizes thoſe acts which were tortious at the time. With reſpect to the firſt point in this caſe, the opinion of Lord Ch. J. *Holt*, in *Salk.* 313, is deciſive; where he ſays, "if "*H.* get the goods of an inteſtate into his hands, and adminiſtra- "tion be granted afterwards, yet he remains chargeable as a "wrongful executor, unleſs he delivers the goods over to the "adminiſtrator before the action is brought, and then he may "plead *plenè adminiſtravit*." From all the authorities it is clear, firſt, that an executor *de ſon tort* muſt deliver over the goods of

the inteſtate to the rightful adminiſtrator, before an action is brought againſt him, and 2dly, that, though he be a creditor of a ſuperior nature, he cannot retain in ſatisfaction of his own debt. Therefore we are of opinion that both theſe pleas are bad, and conſequently there muſt be judgment for the plaintiffs."

But a man who poſſeſſes himſelf of the effects of the deceaſed under the authority, and as agent for the rightful executor, cannot be charged as executor *de ſon tort.*

Thus, in the caſe of *Hall* v. *Elliot*, executor of *Elizabeth Codden*, widow, who was the executrix of her late huſband *Patrick Codden* deceaſed, (*g*) which was an action of *aſſumpſit* for goods ſold and delivered to the teſtator *Patrick Codden* in his lifetime. The defendant pleaded that the teſtator *Patrick Codden* made his will and appointed *Elizabeth Codden* and *Rowland Conyers* executrix and executor thereof, that they both proved the will, and afterwards *Elizabeth Codden* died, and that *Rowland Conyers* was ſtill alive. And the defendant further ſays, "that he never did, as the executor of the ſaid *Elizabeth Codden* who was the executrix of the ſaid *Patrick* as aforeſaid, adminiſter any goods or chattels," &c. The replication traverſed this laſt averment.

Lord *Kenyon*, Ch. J. before whom the cauſe was tried, ſtopped the counſel upon the opening of the pleadings, and ſaid he thought this action could not be maintained. Here is a ſurviving executor who has acted, and he alone is anſwerable. If the defendant has poſſeſſed himſelf of any goods, he is anſwerable to the ſurviving executor for them, and that executor muſt diſtribute them amongſt the creditors.

The counſel for the plaintiff cited *Read*'s caſe, 5 *Co.* 33. which he contended ſhowed that this action might be ſupported, though he admitted that an action would alſo lie againſt the defendant at the ſuit of *Conyers* the ſurviving executor; and obſerved that the objection was on the record. Lord *Kenyon* ſaid he would permit the cauſe to go on, though he had no doubt in his own mind that the action could not be maintained, as it was impoſſible there ſhould be a lawful executor, and an executor *de ſon tort*, at the ſame time. The cauſe accordingly proceeded, but *Conyers*

(*g*) *Peake's Cas. N. P.* 86.

the

the ſurviving executor proving that the defendant acted as agent for him, and accounted with him for the money he received, the plaintiff was nonſuited.

7. *Of an Executor's Liability to be ſued for a Legacy.*

In the caſes of *Atkins* and wife v. *Hill*, (*h*) and *Hawkes* and wife v. *Saunders*, (*i*) it was held that an action of *aſſumpſit* will lie againſt an executor upon an *expreſs* promiſe to pay *a pecuniary legacy iſſuing out of perſonal property*.

But no action at law will lie againſt an executor for a *pecuniary* legacy upon an *implied aſſumpſit* on account of the ſufficiency of aſſets; the legatee's only remedy being in equity.

Thus, in the caſe of *Deeks* and wife v. *Strutt*, (*k*) which was an action brought in *aſſumpſit* for the arrears of an annuity bequeathed to the plaintiff's wife by the defendant's teſtator; wherein the declaration ſtated, that *Robert Canham* the teſtator bequeathed to the plaintiff *Maria* 40*s*. a-year for her life, payable quarterly; that he appointed the defendant his executor; that after his death the defendant proved the will; and then averred that divers goods and chattels of the teſtator came to the hands and poſſeſſion of the defendant to be adminiſtered, fully ſufficient to pay and ſatisfy all the debts, legacies, and funeral expences of the teſtator, and charges of proving the will; and that the defendant was poſſeſſed of a great part of the ſaid goods and chattels, being fully ſufficient to pay and ſatisfy the debts, legacies, funeral expences, &c. then unpaid and unſatisfied; whereby and according to the form and effect of the ſaid will, the defendant became liable to pay to the ſaid *Maria* the ſum of 40*s*. a year in manner aforeſaid; and being ſo liable, he promiſed to pay her, &c.; and then averred that three years and three quarters arrears of the annuity were due. At the trial of this cauſe a verdict was found for the plaintiffs for 7*l*. 10*s*. ſubject to the opinion of the court of *King's Bench* upon the following caſe: "The teſtator *Robert Canham* made his will dated the 31ſt *January* 1774, in which amongſt other things, he gave to his

(*h*) *Comp.* 284. (*i*) *Ib.* 289. *See alſo* Lewis v. Lewis, 1 *H. Bl.* 111. *n. a.* (*k*) 5 *Term Rep.* 690. *See alſo* Pariſh v. Wilſon, *Peake's Cas. N. P.* 73. *S. P.*

daughter *Maria*, the wife of the plaintiff, to her ſeparate uſe, an annuity of 40*s.* for her life payable quarterly. The defendant *Strutt*, who is the ſurviving executor named in the will, which was proved in the prerogative court on the 20th of *May* 1775, paid for ſeveral years the annuity up to *Lady-day* 1792. The defendant never made any expreſs promiſe to pay; but was poſſeſſed of aſſets ſufficient to have paid the plaintiff's demand, if parol evidence of an acknowledgement of having aſſets, without any other evidence of aſſets come to his hands, be ſufficient evidence thereof. The caſe then ſtated a demand and refuſal of the arrears.

The Court determined that this action was not maintainable.

Lord *Kenyon* Ch. J. ſaid: "The ſupporting of the preſent action would be attended with the moſt pernicious conſequences; and I believe that no action till lately (except one in the time of the common wealth) for a legacy has been ſupported in a court of law. The arguments, which have of late years been advanced in ſupport of this action, are founded on the ſuppoſed juſtice of the caſe and the convenience of the parties: but when it is conſidered in what manner a court of equity interpoſes in ſuits for legacies in taking care that proviſion is made for the different parties intitled, and what inconvenience and even ruin to private families would have enſued from determinining that an action can be brought in a court of law for a legacy, I think that thoſe who have wiſhed to ſupport the action in a common-law court would heſitate before they came to the concluſion that the action can be maintained. If an action will lie for a legacy, no terms can be impoſed on the party who is entitled to recover; and therefore when the legacy is given to a wife, the huſband would recover at law, and no proviſion could be made for the wife or her family: whereas a court of equity will take care to make ſome proviſion for the wife in ſuch a caſe; but the whole of this admirable ſyſtem, which has been founded in a court of equity, will fall to the ground, if a court of law can enforce the payment of a legacy. I mention theſe as deciſive reaſons in my mind againſt the juriſdiction of the courts of law over this ſubject; and I know that they have influenced thoſe who once entertained an idea that this action could be ſupported. The only caſe (*l*) that I know of

(*l*) Vide *Nicholſon* v. *Shirman*, 1 *Sid.* 46.

where

where it was ſaid that this action might be maintained happened in the time of the commonwealth; but the reaſon there given was to prevent a failure of juſtice, the *Eccleſiaſtical Courts* being at that time aboliſhed, and the court of *Chancery* not having then, nor indeed until the time of Lord C. *Nottingham*, entertained any juriſdiction over the queſtion of legacies. Therefore as the arguments of convenience and juſtice, on which alone it has been thought that this action is maintainable at law, bear ſtrongly againſt it, and as I only find one caſe, in which it has been ſupported, and which was decided contrary to all precedent, merely becauſe the party had then no other remedy, I am clearly of opinion that the preſent action cannot be maintained."

Aſhhurſt. J. "As this is a queſtion of infinite importance to the public, I am glad that the caſe was reſerved in order that the queſtion may be ſettled. *Primâ facie* it is a ſtrong objection againſt ſuch an action as the preſent that only one inſtance is to be found in which it has been ſupported; and the reaſon of that has been explain d by my Lord Chief Juſtice. Policy and convenience are alſo againſt the juriſdiction of the courts of common law over this ſubject; in a court of law we cannot impoſe any terms on the party ſuing; if he be entitled to a verdict, the law muſt take its courſe: but a court of equity will impoſe on the party applying ſuch terms as they think right and according to conſcience. Innumerable inſtances have occurred in which the interpoſition of that court has proved highly beneficial to private families, by compelling the huſband to make an adequate ſettlement on the wife: but if we were now to determine that an action at law could be maintained for a legacy, wives and families in many inſtances would be left deſtitute of any proviſion."

Groſe, J., "The ground of this action, as it appears on the declaration, is that in conſideration of aſſets, the defendant promiſed to pay this annuity. It is not pretended that the defendant made any expreſs promiſe to pay; and the queſtion is, whether under theſe circumſtances the law does or does not imply ſuch a promiſe; no caſe has been cited to ſhew that it does. There is one caſe (*m*) in the books, where the declaration ſtates that, in conſideration of

(*m*) Davis *v.* Wright, 1 *Vent.* 120. *See alſo Cro. Eliz.* 91. *S. P.*

a for-

a forbearance by the plaintiff to sue, the executor promised to pay the legacy; and the court held that the action might be maintained; but the circumstance of that action being brought on a promise in consideration of forbearance, shows that it was understood that the bare possession of assets was not alone sufficient. This is a novel attempt; and I am of opinion that the action cannot be supported.

But an action at law lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest.

Thus in the case of *Doe* on the demise of Lord *Saye and Sele*, v. *Guy*, (*n*) which was an ejectment for a certain leasehold house and premises. It appeared that the lessor of the plaintiff claimed the premises in question under a bequest of the lease thereof from *Mrs. Mary Guy*, to whom the defendant was executor; that soon after the death of the testatrix, which was in *January* 1802, upon Lord *Saye and Sele*'s application to the defendant to deliver up the possession of the house, he returned for answer by letter, that it was not convenient for him to remove before *Michaelmas* then next, at which period, but not before, he was willing to resign it. By a subsequent letter the defendant informed the lessor that he was ready to resign the house on the 25th of *April*. This was ruled by Lord *Ellenborough*, Ch. J. before whom the cause was tried, to be evidence of the defendant's assent as executor to the bequest. But it being contended further, upon the authority of *Deeks* v. *Strutt*, that no action at law would lie to recover a legacy, which was in substance the case here; a verdict passed for the plaintiff with liberty to the defendant to move the court of *King's Bench* to set it aside, and enter a nonsuit. A rule nisi was accordingly obtained for this purpose.

Upon showing cause against the rule the counsel for the plaintiff argued that the case relied on of *Deeks* v. *Strutt* was where an annuity was devised payable out of the general funds of the testator, which had been paid for several years by the executor; but there was no express promise to pay the arrears for which the action was brought: and the question there was, whether the acknowledgments of assets by the defendant were sufficient to raise an *implied assumpsit* in law to continue the payments as they became due. That differs from a bequest of a specific thing, to

(*n*) 3 *Esp. Rep.* 129.

which

which the executor has expreſsly aſſented, in which caſe there are many authorities in the books to ſhow that ſuch aſſent paſſes the legal title under the will.

The counſel for the defendant relied on the ground of the deciſion in *Deeks* v. *Strutt*, which applied as well to the caſe of a ſpecific legacy as of a legacy payable out of the general fund; namely that no action at law lay to recover it againſt the executor, becauſe a court of law could not in many inſtances do that juſtice to the parties concerned as a court of equity were accuſtomed to do: for the latter would in the caſe of a legacy to a married woman oblige the huſband to make a ſuitable proviſion for her, if ſhe were not before ſufficiently ſecured. Whereas this court could not impoſe terms on one who was entitled to recover upon his legal title. The opinion of the judges in that caſe was delivered generally againſt ſupporting an action at law for a legacy, without the diſtinction now ſet up. The caſes of *Atkins* v. *Hill*, and *Hawkes* v. *Saunders* were indeed caſes of expreſs promiſes; but the reaſoning there went the whole length of this caſe, if it had been well founded; but it was controverted and conſidered to be overruled in *Deeks* v. *Strutt*.

The Court, however, determined that this action was maintainable. Lord *Ellenborough* Ch. J. ſaid: "General language uſed by the court in giving their opinions in any caſe muſt always be underſtood with reference to the ſubject matter then before them. The queſtion of *ſpecific legacy aſſented to by the executor* was not before the court in *Deeks* v. *Strutt*, but whether the law would raiſe an implied promiſe on proof of an acknowledgement of aſſets by the executor, ſo as to ſuſtain an action againſt him, for an annuity, payable out of the general funds of the teſtator. But it never could be doubted but that at law the intereſt in any ſpecific thing bequeathed veſts in the legatee upon the aſſent of the executor. If it ſhould afterwards appear that there is a deficiency of aſſets to pay creditors, the court of *Chancery* will interfere and make the legatee refund in the proportion required. It makes no difference whether the bequeſt be of a *perſonal* or *real* chattel: but according to the doctrine laid down in the caſes cited of *Paramour* v. *Yardley*, (*o*) and *Young* v. *Holmes*, (*p*) and the paſſage from 4 *Rep.* 28.

(*o*) *Plowd.* 539. (*p*) 1 *Stra.* 70.

the aſſent of the executor once given to a ſpecific legacy, veſts the intereſt at law irrevocably; and this is not broken in upon by any ſubſequent caſe. Now here was ample evidence of an expreſs aſſent by the executor; for he appointed a certain day for giving up the poſſeſſion of the houſe to the leſſor of the plaintiff; and therefore the latter is entitled to recover."

Groſe J. "The only queſtion in the caſe of *Deeks* v. *Strutt*, was whether the law would raiſe an an *implied aſſumpſit* to pay the annuity, upon proof of the executor's acknowledgment of aſſets. I thought it would not: but this is the caſe of a ſpecific legacy, in which all the authorities ſhow, that upon the aſſent of the executor, the intereſt veſts at law in the legatee."

Lawrence J. "What was ſaid by the court in *Deeks* v. *Strutt*, muſt be taken with relation to the caſe then before them, which was an action for a legacy not founded upon any *expreſs aſſent* of the executor, but endeavoured to be ſupported upon an *implied aſſent* in law, on account of a ſufficiency of aſſets, which implication the Court held that they could not raiſe. All the Court treated it as a new attempt, and therefore they could not have intended to apply the ſame doctrine to a caſe like the preſent, where there was an aſſent by the the executor to the ſpecific legacy; for there are many authorities in the books, in ſupport of ſuch an action; as in *Duppa* v. *Mayo*, (*q*) where in an action againſt the repreſentative of an executor for the arrears of an annuity bequeathed by the teſtator out of a term of years, a general conſent of the executor to the legacy is alledged in the declaration; on which there was judgment for the plaintiff. So in *Saunder's caſe*, (*r*) it ſaid, "if leſſee for years deviſe his term to another, and make executors and die; and the executors do waſte, and afterwards aſſent to the deviſe; in that caſe, although between the executors and the deviſee, it hath relation, and the deviſee is in by the deviſor; yet an action of waſte ſhall be maintainable againſt the executors in the *tenuit*." There, however, Lord *Coke* clearly conſiders that the aſſent of the executor veſts the term in the legatee from the death of the teſtator. The ſame queſtion came on in another caſe of *Chamberlain* v. *Chamberlain*: (*s*) *Thomas Chamberlain*, made his wife executrix, and bequeathed a leaſe to her for

(*q*) 1 *Saund.* 278. (*r*) 5 *Co.* 12. *b.* (*s*) 1 *Chan. Caſ.* 256.

life,

life, remainder to his ſon for life, remainder to his firſt ſon and his heirs male. The wife aſſented, and died, having made *Croft* her executor. There being a deficiency of aſſets, the queſtion was, if *Croft* could ſell the leaſe? And the Lord Keeper *Finch* declared the leaſe ſhould be aſſets, notwithſtanding the aſſent. But that after ſuch aſſent, *J. Chamberlain*, the ſon, had ſold the leaſe to a third perſon *bonâ fide* this had defeated the creditors; for this had been a good title at law: and the purchaſer ſhould not be defeated by this truſt for creditors. Therefore the Lord Keeper in terms ſaid that the effect of the aſſent of the executrix was to veſt the term in the legatee; though he would be conſidered as a truſtee for the creditors in the event of a deficiency of other aſſets. Alſo in *Baſtard* v. *Stukeley*, (*t*) one deviſed goods to *A.* and *B.*; the executor aſſented to the legacy, and afterward *A.* died: and now the executor of *A.* ſued in the *Spiritual Court* for *A.*'s ſhare, there being no ſurvivorſhip in ſuch caſe by the laws eccleſiaſtical. And prohibition was granted upon demurrer and argument: for by the aſſent of the executor the intereſt was inveſted in the legatees, and became a chattel governable by the rules of the common law. That was the caſe of a chattel perſonal. But *Barton's caſe*, (*u*) which came on to be argued on a demurrer to the prohibition, appears to diſtinguiſh between the caſe of a general and ſpecific legacy. Inaſmuch as it appeared by the ſuggeſtion that the executors had conſented to take as legatees, and by this means the property veſted in them as legatees, and was altered from what it was when they were executors: for when they were executors one might have granted away all the goods, but after taking as legatees one could grant but a moiety. And it is added, when a certain thing, as a horſe or a cow, is deviſed, as ſoon as the executor aſſents, the property veſts in the legatee, and he may have an action at common law for the recovery of the thing: and therefore differs from the caſe in 2 *Roll. Abr.* 301., for that was for a legacy for which the common law gives no remedy. That muſt be underſtood to mean a legacy payable out of the general funds of the teſtator, in contradiſtinction to a legacy of a ſpecific thing."

Le Blanc J. "It is admitted that upon the old authorities there is no doubt of the plaintiff's right to recover, unleſs they have been overruled by the caſe of *Deeks* v. *Strutt*. But that never could

(*t*) 2 *Lev.* 209. (*u*) *Freem.* 289.

have

have been in the contemplation of the Judges there; becauſe it formed a ground of objection with them to the action, that it was a novel attempt to contend that the law would raiſe an *implied aſſumpſit* againſt an executor merely from the poſſeſſion of aſſets. They thought that it would not: and in diſcuſſing that point, they ſhowed the inconvenience which would reſult from extending the law in that reſpect further than it had been carried before. The caſe of *Chamberbaine* v. *Chamberlaine*, (*x*) ſhows exactly the ſituation in which a ſpecific legatee ſtands in the judgment of a court of equity, when the executor has aſſented to the legacy: that it veſts the intereſt at law. Here there was no pretence ſtated even of any equitable ground why the plaintiff ſhould not recover. It was not pretended that from any deficiency of aſſets the ſpecific legatee was likely to be called upon to refund if he recovered: and even now if there were any ground for it, the court of *Chancery*, even after the aſſent of the executor, might reach the property in the hands of the deviſee, as appears from the caſe of *Chamberlaine* v. *Chamberlaine*."

(*x*) 2 *Eq. Caſ. Abr.* 465. 2 *Freem.* 141.

END OF THE FIRST VOLUME.

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